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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-446

RAYMOND K. PROCUNIER, *et al.*,

Petitioners,

v.

APOLINAR NAVARETTE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether negligent interference with a prisoner's outgoing correspondence in 1971-1972 by mail-handling prison officials and their superiors states a cause of action for damages under §1983?

STATEMENT OF THE CASE

Plaintiff alleges in the third cause of action of his amended complaint that defendants, consisting of six named California prison officials, negligently interfered with his outgoing mail

during the fifteen months that he was incarcerated at Soledad Prison, from September 1, 1971 to December 11, 1972. The complaint charges that three of the defendants, subordinate officials at Soledad who process his outgoing mail, negligently confiscated or otherwise caused loss of at least twenty-five of his letters. (A 6-9).[1] The remaining defendants consist of supervisory officials: the state director of the Department of Corrections, the Soledad warden, and the Soledad associate warden. The complaint alleges that these defendants defaulted in their administrative duties to supervise prisoner mail regulation at Soledad by failing to provide the subordinate defendants with sufficient training and guidance to remove the unreasonable risk of interference with outgoing letters protected under constitutional free expression and due process guarantees.

The twenty-five pieces of lost or destroyed mail enumerated in the complaint include: seven letters describing the political struggle by Mexican-Americans against racial discrimination which plaintiff attempted to mail concurrently to as many news media addresses [A 7-8 (item 9)]; letters seeking legal assistance from three law projects as well as three law students [A 6-8 (items 1, 6, 8, 11, 12, 13)]; six letters requesting funds for legal expenses, sample pleadings, and other help for his legal efforts from other inmates and the secretary to Cesar Chavez [A 6-7 (items 2, 3, 4, 5)]; and six letters to personal friends [A 7-8 (items 7, 9, 10)]. As described in the within complaint, the blockage of some of this mail produced prolonged frustration of plaintiff's efforts to file a federal writ of habeas corpus in his own behalf as

[1] Defendants mistakenly understate the number of involved letters to be thirteen (Appellant's Brief, p. 3)

well as to file the within civil rights action.[2] In September and November, 1971, plaintiff wrote letters to Stanford law students asking for help on his federal habeas corpus

[2] Plaintiff asserts the full range of his constitutional free expression and due process rights established in 1971-72, including the due process right of access to the courts. In so doing, plaintiff contends that defendants incorrectly assert that the right of access has already been ruled against and relinquished herein (Petitioners' Brief, p. 3, n. 2). Plaintiff further contends that, in any case, this court can consider said guarantee under the authority of *Boynton v. Virginia*, 364 U.S. 454 (1960), because linked to the rights of free expression and procedural due process by the common core issue herein posed as to the extent to which prisoner mail was constitutionally protected against unreasonable interference in 1971-72. Also see: *Procunier v. Martinez*, 416 U.S. 396 (1974) [First Amendment rights of prisoners' correspondents considered although not raised below]. Explicit assertion of the right of access is necessary to address squarely this common issue because, in 1971-72, that right, although overlapping with the right of free expression, was not necessarily coterminous therewith nor equally established.

Turning to the history of this action, the dismissal order which the district court below granted as to the original complaint on February 9, 1973 excised from that complaint "all issues except obstruction of mail," (R 20). That order patently dealt with factual issues rather than theories of law: rather than delimit the guarantees which plaintiff could assert as protecting his mail from obstruction, the aim and effect of the order was to strike from the complaint certain collateral allegations concerning plaintiff's excessive difficulties in gaining access to a notary public and securing needed forma pauperis documents (R 4). The within second amended complaint does sufficiently assert the right of access in relation to mail obstruction. Facts indicating denial of this right are alleged in sufficient detail (see above text discussion), and, although the right of access is not therein named in terms, the due process guarantee from which it springs is expressly asserted by the third cause of action (A 100, 13). That the within complaint encompassed plaintiff's right of access to the courts was certainly not lost on defendants. In their motion for dismissal or summary judgment brought after filing of the within complaint, defendants expressly argued that the first three causes of action, involving mail interference, should be dismissed because the right of access was not in terms alleged and because these claims possessed insufficient detail concerning how obstruction of plaintiff's legal mail interfered with his court actions (R 114). The district court

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pleadings.[3] In December, 1971, plaintiff sent his only copy of a draft of these pleadings to the Prison Law Project. He sought to have this letter sent by registered mail, but defendants refused. These draft pleadings then becoming lost in the mail, plaintiff wrote a volley of letters during January, 1972, seeking help to make up the ground thus lost in his legal effort [A 6-7 (items 2, 3, 4, 5)].[4] Plaintiff at last filed his writ of habeas corpus in March, 1972,[5] although he again tried unsuccessfully that September to contact a law student

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(footnote continued from preceding page)
rejected this argument by granting summary judgment rather than dismissal as to the first three causes of action (R 189). The circuit court below thereafter noted the possible bearing of plaintiff's right of access on the correspondence herein enumerated (App. Pet, iii, n.1).

Plaintiff did not, in the within complaint, specify the rights relied upon by the third cause of action beyond referring to free expression and due process, nor did plaintiff press either the right of access or the procedural guarantee intrinsic to first amendment rights in his argument before the courts below, because the decision in *Wood v. Strickland*, 420 U.S. 308 (1975) had not yet been rendered (A 1-2). That decision together with its progeny have thrown into sharper focus than had *Pierson v. Ray*, 386 U.S. 547 (1967), the issue of what rights were settled at the time of the conduct in question, an issue which calls in the within case for closer analysis than before of the historical evolution of particular rights which touch prisoner correspondence.

[3] Plaintiff had previously filed companion writs of habeas corpus in federal court, *Navarette v. Comstock*, 325 F. Supp. 261 and *Navarette v. Comstock*, 325 F. Supp. 264 (C.D. Calif. 1971). In both foregoing decisions, rendered on March 26, 1971, the writs were dismissed with leave to refile after further exhausting state remedies. In all likelihood, plaintiff's efforts herein to file a habeas corpus writ were in response to that opportunity for refiling.

[4] Evidence submitted for summary judgment reveals that, during January, 1972, plaintiff also wrote at least four letters to the Prison Law Project inquiring about the lost habeas corpus pleadings (R 83-88, 129).

[5] In his original complaint herein, plaintiff alleged that the mail interference described hereinabove forced him to prepare the writ of habeas corpus totally from notes and memory (R 4).

for help in this habeas corpus action [A 7 (item 8)]. In February and March, 1972, plaintiff tried to start the within civil rights action, enclosing copies of his drafted complaint in successive letters asking law projects to represent him.[6] Plaintiff, pro se, finally filed his first complaint in the within action on October 30, 1972,[7] seeking temporary and permanent injunctive relief against mail interference as well as damages (R 1, 5, 6). However, no immediate decision was made concerning the requested injunctive relief, and this request thereafter lost its urgency when plaintiff received his parole release on December 11, 1972 (A 5). Plaintiff therefore omitted the request for injunctive relief from later amended complaints.

Without filing any other response to the within complaint, defendants moved for dismissal or summary judgment. In support of summary judgment, defendants submitted affidavits by all defendants but the state director (R 139-142), their written records of plaintiff's correspondence (R 129,

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[6] Defendants mistakenly argue that plaintiff's letter to La Casa Legal during February 1972 [A 7 (item 6)] must have reached this law project because "on February 2, 1972, La Casa attorneys filed a brief herein (R 22)" (Petitioners' Brief, p. 4, n.4). In fact, the brief to which defendants refer was filed on February 2, 1973 (R 22), not in 1972, and plaintiff never made contact with this law project by letter or otherwise, until after his parole release in December, 1972 (R 187-188). Indeed, had plaintiff successfully contacted La Casa Legal when he tried to do so in February, 1972, this project might have obtained injunctive relief in time to avert much of the mail interference involved herein.

[7] Plaintiff actually had raised essentially the same claims in an earlier complaint filed with the same court on August 14, 1972 (App. Pet. 2; R 22). In September, 1972, the court ordered plaintiff to replead his claims more succinctly (R 22). Plaintiff did so, filing his revised complaint on October 30, 1972. The court clerk thereupon assigned a new action number to the letter complaint (App. Pet. 2; R 22). The earlier complaint has not been made part of the within record.

131, 133, 135, 138), and certain prisoner regulations issued by the state director (R 144-156).[8] In opposition thereto,

[8] The regulations submitted by defendants which controlled prisoner mail until August 10, 1972, and hence affected virtually all plaintiff's obstructed correspondence, were premised on the policy that the sending and receiving of mail by prisoners "is a privilege, not a right," [D2401] (R 144). Apart from assuring correspondence with licensed attorneys and courts [D2406] (R 151), and certain enumerated state officials [D2404] (R 151), the regulations provided only this guidance for evaluating content of prisoner correspondence:

> "You may not sent or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain prison gossip or discussion of other inmates; or are otherwise inappropriate." [D2402(8)] (R 145)

Under these regulations, each prison warden possessed unlimited discretion to allow or disallow any correspondence with persons not on an approved list [D2403] (R 145), any outgoing letters that exceed a page in length [D2402(6)] (R 145), the sending of any outgoing letters by registered mail [D2402(10)] (R 145), and any correspondence with inmates at other prisons [D2402(13)] (R 145). A later amendment to these regulations, issued on April 30, 1971, provided further that each warden "may provide for the censoring of inmate correspondence . . . as deemed necessary," [D2406] (R 151).

Until August 10, 1972 the state regulations did not require that inmates be notified of disallowed mail, although defendants apparently acknowledge that it was their practice at least to return disallowed mail to inmates (R 140, 142). From the wording of his bulletin on August 10, 1972, it appears that the state director had, prior to that date, required that inmate appeal procedures be established within each prison (R 156), although no evidence yet exists to disclose whether any such appeal procedure existed at Soledad, or, if so, whether it was available to inmates dissatisfied with disallowances of their mail.

In his bulletin issued to all correctional staff on August 10, 1972, the state director decreed the new policy regarding prisoner mail that "[c]orrespondence . . . should be allowed to the maximum extent compatible with total institutional needs and resources," (R 155) and accordingly announced that the discretion of prison administrators to deny items of prisoner correspondence would be limited to situations either threatening institutional safety and order, or involving harmful relationships. (R 155). The bulletin also provided that all denied correspondence should be justified by written reasons supplied on

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plaintiff submitted five affidavits (R 75-89, 183-184).[9] In ruling as to the third cause of action, the district court

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request to the inmate, and that the inmate should be apprised of his recourse through "the established institutional appeal procedure," (R 155-156). Plaintiff posted only one of his obstructed letters after the date of this bulletin [A 7 (item 8)].

[9] Defendants argue that all the correspondence herein alleged to have been obstructed, except only plaintiff's letter to the Prison Law Project in December, 1971, could well have been refused through valid applications of the state mail regulations (Petitioner's Brief, p. 3, n. 4) yet defendants' affidavits concerning their asserted good faith in handling plaintiff's mail notably lack any assertion that their efforts to comply with applicable regulations were reasonable (R 140, 142). Indeed, the following violations of the state regulations are apparent:

(1) *Letters protesting discrimination:*

Plaintiff's eight concurrent letters to seven news media addresses and Roger Cortez (apparently a personal friend) were disallowed by defendants Neal and Kramer, Soledad correctional counselors, because "not legal mail [and] not business or personal mail," (R 138). This ground for disallowance patently lies outside the pale of the grounds specified in D2402(8) of the state regulations. Whereas D2402(8) at least requires that, to justify their denial, letters must possess disallowable characteristics, the basis for disallowance used with these letters adopts the converse approach of specifying narrow criteria, wholly unrelated to D2402(8) grounds, which a letter must fit to be allowed. The arbitrariness of this basis for disallowance is further indicated by the fact that, on other occasions during 1972, letters from plaintiff to certain of these same news media addresses were indeed permitted (twice in April to Chicano Daily, twice in May to La Opinion, once in May to El Hispano, and once in August or September to La Verdad) (R 129, 131, 133). Moreover, although it appears that plaintiff was given a copy of the above-quoted reasons for disallowance of these letters (R 138), there is no evidence that he was informed of any opportunity to challenge the disallowance, although a procedure to do so may well have existed at Soledad by that time (see footnote 8, supra).

(2) *Mail to Law Projects:*

The letter to the Prison Law Project was presumably mailed (R 129), but it appears that defendant Johnson, the Soledad mailroom clerk,

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granted summary judgment to defendants without opinion (R 187). The court below reversed this ruling, stating that

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refused plaintiff's request to send it by registered mail (R 75). This refusal apparently violated the regulation providing that such requests are to be determined by the prison warden in his discretionary judgment [D2404(10)] (R 145). Despite defendants' contention to the contrary regarding the letter to La Casa Legal (See Appellant's Brief, p. 4, n. 4, and footnote 6, supra), it appears that the letters to this law project as well as the law project at Santa Clara University were never sent (R 129), despite the assurance given attorney mail by D2406 of the state regulations. In light of evidence that the Soledad warden was unsympathetic toward prisoner civil rights actions (R 81), the possibility appears that the within subordinate defendants resorted to unreasonable grounds to deny these letters because of a similarly adverse attitude toward civil rights actions (particularly in that they were probably named as defendants by the draft complaint contained in these letters). These subordinates may for example have clung unreasonably to a disbelief that the addressee law projects were staffed by licensed attorneys.

(3) *All Denied Correspondence:*

Apart from the letter to the Prison Law Project and the news media letters, the balance of plaintiff's correspondence herein obstructed could well have been unaccountably lost or mislaid due to inadvertant mishandling, rather than intentionally disallowed. In any case, none of this obstructed mail, whether inadvertantly mishandled or affirmatively disallowed, was ever returned to plaintiff. Failure to do so violated the seemingly conceded practice at Soledad of returning to the inmate all mail deemed not in compliance with state or institutional regulations (R 140, 142). Furthermore, affirmative disallowance of the letters to law students Burke and Sonora, or the personal letters to Serna, could well have violated the regulations since letters from plaintiff were permitted to these addresses on many other occasions [five times between July and November, 1972, to Burke (R 131, 133); twice during October and November to Sonora (R 133); once during April and twice during August, 1972 to Serna (R 129, 133)]. Even if these last-mentioned letters were subject to administrative discretion under applicable regulations, the inconsistency of disallowing them while permitting other letters to the same addresses strongly suggests violation of the purpose, implicit in the very existence of such regulations, to assure consistent decision-making.

summary judgment as to the third cause of action was improper in light of the evidence (App. Pet. viii, n. 6). In reaching this holding, the court below did state that a deprivation of federal rights "need not be purposeful to be actionable under §1983" (App. Pet. vii), but carefully added this caveat:

> "Of course we do not imply that all tortious conduct engaged in by a public official acting under color of law is subject to redress under §1983 . . . Nevertheless, here the prisoner's rights which Navarette alleges to have been violated are fundamental and reasonably well-defined; his allegations that state officers negligently deprived him of those rights state a §1983 cause of action." (App. Pet. viii).

SUMMARY OF ARGUMENT

Defendants' argument that the legislative intent underlying §1983 as well as recent decisions by this Court constrict the reach of §1983 solely to intentional conduct falls of its own weight when examined.

In *Monroe v. Pape*, 365 U.S. 167 (1961), an exhaustive analysis of the legislative history underlying §1 of the Klu Klux Klan Act of 1871 revealed that, in enacting this predecessor to §1983, Congress by no means wished to limit this remedial statute to a narrow focus on purely intentional conduct by offending state officials. To the contrary, the Congress was alarmed by the widespread failures of state officials to protect the federal rights through enforcement of available state laws, and designed this remedial statute to reach the full gamut of such failures, neglectful or otherwise. *Monroe* confirmed this intended scope of §1983 in clear language designed to be a definitive construction of said statute rather than merely a holding on the facts therein.

The decisions by this Court since *Monroe*, cited by defendants in support of their contention, do not engraft any

state of mind requirement upon §1983 claims. *Rizzo v. Goode*, 423 U.S. 362 (1976), concerned the causation requirement of §1983. *Paul v. Davis*, 424 U.S. 693 (1976) delineated due process rights in relation to reputation, and *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976) did likewise in connection with employment interests. *Estelle v. Gamble*, ____ U.S. ____, 50 L.Ed.2d 251 (1976), established the "deliberate indifference" standard purely as a minimum mental state intrinsicallly required by the Eighth Amendment.

While the decision in *Pierson v. Ray*, 386 U.S. 547 (1967), *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Wood v. Strickland*, 420 U.S. 308 (1975), do set forth qualifying mental states in relation to allowable immunities, defendants overlook the fact that these mental state requirements possess considerable common ground with the law of negligence. Each of these decisions adapts for §1983 use the common law immunities accorded executive officials by striking balances between the §1983 purpose to remedy official infringement of federally protected rights, and the competing immunity purpose of encouraging official action unencumbered by threat of liability. In each such formulation of qualified immunity for §1983 purposes, this Court has consistently required objectively reasonable conduct of the offending state official, as well as his good faith, before permitting him immunity. The obligations implicit in this requirement of reasonable conduct have been given contours fitting the circumstances of each situation. This Court has thus broadly delineated official conduct which should be subject to §1983 monetary liability along lines closely paralleling the law of negligence. Accordingly, although the question herein presented is cast in terms of negligence, this case provides the opportunity for this Court to refine further the meaning of reasonable conduct in light of policy considerations surrounding §1983 litigation.

In this connection, the law of negligence can furnish useful guidance. Essentially a balancing approach to the resolution of conflicting interests which has been distilled over centuries of

adjudication, negligence doctrine has accumulated considerable wisdom concerning the meaning of reasonable conduct. Indeed, there exists a substantial body of decisional law concerning monetary liability under §1983 in which most lower federal courts have found guidance from negligence doctrine in weighing the meaning of reasonable conduct within particular factual contexts. The lower federal courts have thereby reached some insights into the gauging of reasonable conduct for §1983 purposes which offer further guidance to this Court as it sharpens the meaning of reasonable conduct in relation to the alleged obstruction of this plaintiff's mail by the within prison officials. The obligation of the supervisory officials herein to avoid unreasonable risks of trenching upon plaintiff's constitutional interests should include, in addition to reasonable supervision of mail decisions by subordinates, *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972), reasonable care in establishing and when necessary revising the overall system for evaluating prisoner mail, *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976), *Dewell v. Larson*, 489 F.2d 877 (10th Cir. 1974). The degree of obligation to thus act reasonably should be fixed in light of any institutional limitations, *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973), the comparative decision-making leisure of the within supervisory officials, *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968), and whether or not the involved conduct resulted from any considered exercise of discretion, *Scheuer v. Rhodes*, supra. The obligations of the within subordinate prison officials to function reasonably should concededly be comparatively limited in light of their considerable liability exposure from intensive contact with every aspect of prisoner's lives. However, this consideration is much diminished by situations such as herein where prison officials face similar liability under state law for their negligence, *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972), and where fundamental prisoner freedoms are at stake, *Bonner v. Coughlin*, 545 F.2d 565, 573 (Swygert, J. dissenting) (7th Cir. 1976).

The within prison officials should reasonably have been aware that plaintiff's obstructed correspondence was protected by constitutional guarantees which had become established by 1971 within the meaning of *Pierson v. Ray*, 386 U.S. 693 (1967), and *Wood v. Strickland*, 420 U.S. 308 (1975). As further elucidated by this Court in *Cox v. Cook*, 420 U.S. 734 (1975), and by the lower federal courts, the *Pierson* and *Wood* standards can be met by showing that the rights at issue had been established prior to the infringing conduct by judicial rulings not only from this Court, but equally from lower federal and state courts, particularly the courts within the jurisdictions of which the involved conduct occurred. As state officials assess the applicability of existing decisional law to their own conduct, the *Pierson* and *Wood* standards require such officials to recognize that judicial decisions possess controlling implications reasonably beyond the particular facts giving rise to the decisions.

These standards were herein met by four decisions rendered by the district court below during the two years preceding the time period herein involved. *Hyland v. Procunier*, 311 F. Supp. 749 (N.D. Calif. 1970), *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Calif. 1970), aff'd (sub nom *Younger v. Gilmore*), 404 U.S. 15 (1971), *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Calif. 1970), *Payne v. Whitmore*, 325 F. Supp. 1191 (N.D. Calif. 1971). Each of these decisions clearly affirmed that constitutional rights can only be curtailed for prisoners by state regulation which passes muster under due process reasonableness: two of the decisions, *Hyland* and *Payne*, squarely uphold free expression. Hardly at variance with the trend of decisional law elsewhere, these district court decisions were not only accompanied by similar decisions from California state courts and the circuit court below, but indeed were part of a steadily growing if not already predominant attitude among federal courts throughout the nation that the constitution protects prisoner free expression.

The *Pierson* and *Wood* standards were additionally met herein by decisions from this Court establishing that

regulation of constitutionally guaranteed free expression, including mail, must be accompanied by procedural protection, *Kunz v. New York*, 340 U.S. 290 (1950), *Freedman v. Maryland*, 380 U.S. 1 (1965), *Blount v. Rizzi*, 400 U.S. 410 (1971), as well as by judicial decisions clearly establishing that the due process right of access to the courts protects prisoner mail involving preparation for litigation, *Gilmore v. Lynch*, supra.

I.

SECTION 1983 CLAIMS ARE NOT LIMITED TO INTENTIONAL CONDUCT

A. This Court Has Discerned No Such Limiting Congressional Intent

In its exhaustive analysis of the legislative history underlying §1983, *Monroe v. Pape*, 365 U.S. 167 (1961), discerns no intention by the enacting Congress to circumscribe the reach of the civil remedies created by §1983 to intentional conduct by state officials who infringe upon federally protected rights. In reviewing the Congressional debates preceding passage of §1 of the Klu Klux Klan Act, the direct ancestor of §1983, *Monroe* finds the sense of Congress illustrated by the words of Mr. Lowe of Kansas during the debates that "[w]hile murder is stalking abroad in disguise . . . the local administrations have been found *inadequate* or unwilling to apply the proper corrective," (emphasis added), *Monroe*, 365 U.S. at 175-176. To similar effect is the comment in *Monroe*, 365 U.S. at 174, n.10, that:

> "The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of §1: '[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, *for a mere error in judgment* [he is liable] . . .' (emphasis in original)

Monroe, 365 U.S. at 176-177, recites a statement during the debates by Mr. Burchard of Illinois as likewise recognizing the broad reach of the Klu Klux Klan Act to situations in which

> "secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights *without proper effort to discover, detect*, and punish the violations of law and order."[10] (emphasis added).

This Congressional mood in enacting §1 of the Klu Klux Klan Act is summarized in *Monroe*, 365 U.S. at 180:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or *otherwise*, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (emphasis added).

It is evident from the tenor of the legislative history reviewed in *Monroe* that the above-emphasized terms, "neglect . . . or otherwise", were advisedly chosen to capture the legislative concern. *Monroe* meant to reflect this historical perspective in fashioning the oft-cited gloss on §1983 that it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,"

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[10]Petitioners quote this passage [Petitioners' Brief at p. 11] in support of their argument that the term "neglect" in §1986 refers to wanton conduct rather than simple negligence. However, petitioners' assumption that the indicated remarks by Mr. Burchard were made with the predecessor of §1986 in mind is subject to serious question in that *Monroe* recites these remarks in the course of reviewing debate relevant to §1 of the Klu Klux Klan Act (now §1983). Moreover, the remarks themselves appear to be more directed toward the §1983 focus on state officials who fail, through neglect or otherwise, to enforce the laws, than at the §1986 focus on any person who, despite full knowledge that particular conspiratorial crimes are about to be committed, neglects or refuses to help in preventing the crimes.

Monroe, 365 U.S. at 187. The introductory statement in *Monroe*, 365 U.S. at 172, that the Court therein faced the issue of whether §1983 extended to "an official's abuse of his position" hardly connotes a prejudgment by the Court that §1983 is limited in every potential application to intentional conduct by state officials. It would untenably distort the meaning of that phrase to give it any coloration other than that of the historical analysis which it introduces.[11] *Monroe* clearly imposed no minimum state of mind requirement upon the character of official conduct made actionable by §1983.[12]

Petitioners further contend [Petitioner's Brief, p. 10, n. 16] that §1983 should be limited to intentional conduct because the language of said statute lacks the term "neglect", whereas Congress advisedly included said term in §1986. However, while it may well be appropriate to conclude that Congress acted advisedly in withholding said term from §1983, just as *Monroe* concluded as to absence from §1983

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[11]Petitioners' contention that "[i]t is difficult to perceive an abuse of office being anything but intentional conduct," (Petitioners' Brief, p. 12) is belied by the breadth of meaning given the term "abuse" by Webster's New World Dictionary (Second Coll. Ed.), p. 6: "(1) wrong, bad, or excessive use (2) mistreatment; injury (3) a bad, unjust, or corrupt custom or practice."

[12]It is noteworthy that the dissenting opinion by Justice Frankfurter in *Monroe*, 365 U.S. at 202-259, did agree with the majority that conduct actionable under §1983 should not be limited to actions infused by certain mental states. Observing that the specific intent requirement established in *Screws v. United States*, 325 U.S. 91 (1944), was largely a fiction diluted "in practice to mean no more that intent without justification to bring about the circumstances which infringe . . . rights," Justice Frankfurter concluded as to this point,

> "If the courts are to enforce [§1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation . . . Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient." *Monroe*, 365 U.S. at 207-208.

of the term "wilfully", Petitioners' statutory construction hardly follows. It can reasonably be concluded only that Congress intended by use of the term "neglect" in §1986 to limit liability thereunder more narrowly than under §1983. Whereas §1986 provides for liability in damages as its exclusive remedy, §1983 provides for redress in both law and equity. Accordingly, the term "neglect" limits §1986 liability for the private defendants sued thereunder to conduct no less than negligent, a result consistent with tort principles prevailing when the Klu Klux Klan Act was enacted. In contrast, equitable principles–then as now–called for no such rigid limitation upon the equitable relief afforded by §1983, and accordingly none was imposed by the §1983 language. Further support for this construction is found in the fact that §1983 actions lie against state officials. Congress may plausibly have intended to impose monetary liability upon a comparatively broad range of conduct by such defendants, in contrast to §1986 liability, due to the fact that Congress plainly considered unmet responsibilities of state officials to constitute a central contributing factor to the continued widespread lawlessness.

B. This Court Has Not Imposed Any Such Limitation

Petitioners claim that recent decisions by this Court construing §1983 have consistently limited the reach of this statute to intentional conduct by state officials. However, apart from the decisions defining qualified immunities available under §1983 (considered at pp. 30-36, infra), these decisions undertake to clarify parameters of valid §1983 claims which bear no relation to any new requirement for all §1983 claims that the wrongdoing state official possess some qualifying mental state. To the extent that a common thread can be discerned among these latter decisions, it appears to consist in defining justiciable §1983 claims in a manner which accords this civil rights statute "a sweep as broad as [its]

language," *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971), while refraining from making "of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, ____ U.S. ____, 47 L.Ed.2d 405, 413 (1976). None of these decisions revise or add to the literal requirements for stating a claim under §1983: namely, that (1) defendant deprive plaintiff, or cause his deprivation of a federally protected right: and that (2) defendant in so doing act under color of state law. Cf. *Adickes v. Kress & Co.*, 398 U.S. 144, 151 (1970).

Thus, in *Rizzo v. Goode*, 423 U.S. 362 (1976), this Court concluded that the causation requirement expressed by the statutory language of §1983 was unmet by the tenuous connection found between the inaction of defendant city officials and the misconduct of a small handful of police officers. In thus ruling, this Court by no means held that actions by supervisory defendants specifically intended to invade constitutional rights, such as involved in *Hague v. C.I.O.*, 307 U.S. 496 (1939) and *Allee v. Medrano*, 416 U.S. 802 (1974), were necessary to a sufficient showing of causation. Rather, this Court simply required "some showing of direct responsibility", *Rizzo*, 423 U.S. at 376, attributable to the supervisory defendants. No such showing could be derived from the facts therein for two reasons: because (1) there was no "affirmative link between the . . . police misconduct and the adoption of any plan or policy by petitioners–express or otherwise–showing their authorization or approval," *Rizzo*, 423 U.S. at 371, and (2) the alternative of an unmet affirmative duty, therein proposed by the lower court in terms of a duty owed to the entire citizenry of the city to minimize police misconduct, was unacceptably diffuse under those facts. Hence, the point of *Rizzo* is that the action or inaction of a supervisory defendant must directly cause the unconstitutional harm before he can be held responsible

therefore, not that such a defendant can be held to account only if he intended the harm.[13]

Similarly, *Paul v. Davis*, supra, was not concerned with excising all negligent official behavior from the ambit of §1983, but rather with clarifying the extent to which an individual's interest in reputation may enjoy protection under the procedural and substantive guarantees of Fourteenth Amendment due process. In determining said question, this Court emphasized as to §1983 actions generally that a plaintiff must be able to point to a "specific constitutional guarantee safeguarding the interest he asserts has been invaded," *Paul*, 47 L.Ed.2d at 413, before he can turn for any relief to §1983. Unless such a constitutional guarantee also be involved, the invasion by a state official of an interest protected under state law cannot, merely because of the official status of the defendant, give rise to a §1983 claim. Thus it follows from this conclusion that many intentional wrongs as well as negligent wrongs lie outside the ambit of §1983.

In the same vein, *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976) was concerned not with insulating unintentionally mistaken personnel decisions by public agencies from the reach of §1983, but rather–much as in *Paul*–with clarifying the bounds of procedural due process guarantees for a discharged public employee. These bounds of due process protection were demarcated in *Bishop* not by consideration of how innocent or aggravated was the mental

[13]It appears clear that no *Rizzo* problem of causation exists as to the supervisory defendants herein. These defendants issued and implemented such vague and ambiguous prisoner mail rules that the frequent failure of their subordinates to follow the rules in practice was clearly sufficiently foreseeable, whether or not the subordinates were themselves negligent in thus departing from the rules, to render these supervisory defendants legally responsible for the resultant widespread arbitrariness in handling prisoner mail. This Court in effect so held in *Procunier v. Martinez*, 416 U.S. 396 (1974).

state of the employer. The demarcation was made instead through precise articulation of the characteristics intrinsic to the due process liberty or property rights potentially implicated.

In parallel fashion, this Court determined in *Griffin v. Breckenridge*, supra, that the legislative history to §1985 revealed no Congressional intent to limit that civil rights provision by a "color of law" requirement, and accordingly overturned the contrary ruling in *Collins v. Hardyman* (1950) 341 U.S. 651. This Court simultaneously cautioned that §1985 was not "intended to apply to all tortious, conspiratorial interferences with the rights of others," *Griffin*, 403 U.S. at 101, and that "constitutional shoals . . . lie in the path of interpreting §1985(3) as a general federal tort law," *Griffin*, 403 U.S. at 102. The Court avoided the risk that §1985 would thereafter be extended to ordinary assaults by multiple assailants through its ruling that a valid claim thereunder must include "the kind of invidiously discriminatory motivation stressed by the [enacting Congress]," *Griffin*, 403 U.S. at 102.

As in *Paul* and *Griffin*, the decision in *Estelle v. Gamble*, 429 U.S. 97, (1976), is concerned with fixing the ambit of a particular constitutional guarantee–here the Eighth Amendment. Facing the context of shortcomings in medical treatment for prisoners, this Court reviewed the meaning which previous decisions had given the guarantee against cruel and unusual punishment, and determined that "deliberate indifference to serious medical needs of prisoners," *Estelle*, 429 U.S. at 104, is equivalent to the established meaning of the Eighth Amendment. It was on the basis of this meaning intrinsic to the Eighth Amendment–not an abstract commitment to limit all §1983 actions to intentional conduct–that this Court went on to demarcate further the outer limit of this guarantee, *Estelle*, 429 U.S. at 105-106:

> "an inadvertant failure to provide adequate medical care cannot be said to constitute a 'wanton infliction of unnecessary pain' or to be 'repugnant to the conscience

of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."

II.

MONETARY LIABILITY UNDER SECTION 1983 SHOULD REACH EXECUTIVE CONDUCT POSING UNREASONABLE RISKS OF CONSTITUTIONAL HARM

A. Previous Decisions By This Court Impose This Standard

It has been in the context of potential monetary liability of state executive officers that this Court has inquired into the mental states of such officials when engaged in conduct infringing constitutional interests, then permitting immunity to the extent that the weighing of competing interests so warrants. *Pierson v. Ray*, 386 U.S. 547 (1967), *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *Wood v. Strickland*, 420 U.S. 308 (1975). In fashioning standards for such qualified immunity, this Court has turned repeatedly to the touchstone of objectively reasonable conduct. This use of the concept of reasonableness suggests the existence of common ground with the law of negligence. Negligence law does not comprise the rigid doctrine of liability suggested by defendants, either to be incorporated whole cloth into §1983 caselaw or rejected in its entirety. Far from infrangible, the law of negligence amounts to a fluid approach to the resolution of social conflict distilled over centuries of common law adjudication[14]

[14]One commentator reports that the English case of Lowe v. Cotton (1701) involved a civil claim seeking damages from a postal employee for his negligence, the claim being denied by a divided court (Chief Justice Holt dissenting). Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 14 (1963).

and wholly adaptable to use in §1983 caselaw in a manner consistent with surrounding federal policy.[15]

The law of negligence is predicated on the social policy that members of society should be held to an objective standard of reasonable caution concerning the possibility of harming others. In practical effect, compensatory liability is imposed on persons who harm others while engaged in "conduct which involves an unreasonably great risk of causing damage." W. Prosser, *Law of Torts*, (4th Ed. 1971) §31, p. 145. Negligent conduct differs only in degree, in some respects subtly, from intentional conduct where resulting harm is desired or at least substantially certain to follow. In one sense, the distinction between intentional and negligent conduct can be drawn in terms of a continuous scale of descending probabilities of harm:

> "As the probability that the consequence will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes more reckless . . . As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence." Restatement, Second, Torts, §8A Comment.

But the foregoing formula risks obscuring the fact that "the real basis of negligence is not carelessness, but behavior which

[15]A similar adaptation of the tort concepts of recklessnesss and negligence into a federal context was made in *New York Times v. Sullivan*, 376 U.S. 254 (1964), where this Court determined that, in a defamation action, the First Amendment free speech guarantee required more protection for public criticism of government officials than afforded by the common law defense of truth. This Court accordingly fashioned a qualified privilege immunizing public comment unless actually malicious, with such malice to entail at least a "reckless disregard of whether [the statement] was false or not," *Sullivan*, 376 U.S. at 280. Regarding the evidence therein, this Court ruled that the privilege had not been exceeded because there was support for no more than "a finding of negligence in failing to discover [the falsity]," *Sullivan*, 376 U.S. at 288.

should be recognized as involving unreasonable danger to others," W. Prosser, supra, §31, p. 145. While negligent conduct frequently consists in inadvertant or careless unawareness of such danger, "it may also exist where [the actor] has considered the possible consequences carefully, and has exercised his own best judgment," W. Prosser, supra, §31, p. 145, but unreasonable risk nonetheless remains.[16] Thus, an act or omission may at once be intentional as to a factual result desired or substantially certain to follow, but negligent as to the harm thereby caused.[17]

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[16]Reasonable preparation can, of course, sometimes spell the difference between negligent and nonnegligent conduct. Restatement, Second, Torts, §300 (*Want of Preparation*).

[17]This can be true in two senses. First is the sense in which a factual result is intended, but the intention does not encompass any consequence to another. This example is illustrative: "[w]hen an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result," Restatement, Second, Torts, §8A *Comment*. Similar circumstances can readily be imagined, such as target practice in a residential area, where the risk of adversely affecting another rises to unreasonable proportions. The upper limit of conduct in which consequential injury to another lies outside the actor's intention is demarcated by Prosser: "The man who fires a bullet into a dense crowd may fervently pray that he will hit no one, but since he must believe and know that he cannot avoid doing so, he intends it," W. Prosser, *supra*, §8, p. 32. The second sense in which intended action can be negligent or otherwise nonintentional as to resulting harm consists in intended factual results which do encompass affecting another, but involve awareness at most only that a risk exists of the law deeming the intended effect upon another to constitute an injury. It is with reference to intentional action of this second sort that this court has required reasonable awareness of the applicable law, *Pierson v. Ray*, supra, *Wood v. Strickland*, supra, whereas the tort law of trespass and conversion imposes liability even where property is intentionally interfered with "in good faith, under the [actor's] mistaken belief, however reasonable, that [he] is committing no wrong," W. Prosser, *supra*, §13, p. 74 [trespass to land], §14, p. 77 [trespass to chattels], §15, p.. 83 [conversion].

Finally to be emphasized is that the negligence standard of reasonable conduct, far from reducible to a mechanistic or quantitative formula, is the flexible product of a weighing process sensitive to each situation, with the result that "conduct which would be proper under some circumstances becomes negligence under others," W. Prosser, supra, §31, p. 149. As Prosser states further, this standard of conduct

> "is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." W. Prosser, supra, §31, p. 149.

Put another way, the weight attached to the conduct in question depends on its utility to the interest being advanced and the availability of less dangerous alternatives, as well as the social value given the interest itself. See: Restatement, Second, Torts, §292 (*Factors Regarding Utility of Conduct*). A factor related to those quoted above as bearing on the weight given risks thus entailed consists in "the number of persons whose interests are likely to be invaded if the risk takes effect in harm," Restatement, Second, Torts, §293 (*Factors Regarding Magnitude of Risk*).

Similarly to the foregoing negligence precepts, the decisions of this Court in *Pierson v. Ray*, supra, *Scheuer v. Rhodes*, supra, and *Wood v. Strickland*, supra, reach definitions of allowable conduct, gauged in terms of reasonableness, after going through inquiry into underlying policy considerations. In *Pierson*, this Court was moved to allow a qualified immunity to police officers sued for damages under §1983 for making erroneous arrests. To insulate such an officer from the dilemma of liability exposure unmitigated by any intent requirement, putting the officer to an untenable choice "between being charged with dereliction of duty if he does not arrest, and being mulcted in damages if he does," *Pierson*, 386 U.S. at 555, this Court ruled that the prevailing common law defense of good faith and probable cause is available to

police officers as a qualified immunity in such §1983 actions. This Court further ruled, for the same reason, that such an officer is likewise insulated from §1983 liability "for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional," *Pierson*, 386 U.S. at 555. Thus, as to both the suspicion inducing him to make an arrest and his belief in validity of the law authorizing the arrest, the officer may undertake the arrest only upon possessing reasonably sufficient information.[18] These informational requirements are readily translatable into the terms of a negligence standard of conduct.[19] The officer who arrests only upon possession of the requisite factual and legal information thereby reduces to reasonable proportions the risk that he will violate the interest of the person he has under scrutiny against being mistakenly arrested.

In *Scheuer v. Rhodes*, supra, this Court extrapolated from the qualified immunity of good faith and probable cause for arresting police officers to enunciate a similar immunity for other executive officers exercising discretionary duties. Examining the established purpose of §1983 to provide a remedy for persons deprived of federal rights by state officers "whether [the officers] act in accordance with their authority or abuse it," *Scheuer*, 416 U.S. at 243; the court weighed against this statutory purpose the competing interest in encouraging officials to decide and act for the public, even at

[18]Probable cause is defined as "a reasonable ground for suspicion that a [crime] has been committed . . . [provided that] mere suspicion, unsupported by information, is not enough." W. Prosser, supra, §26, p. 135.

[19]The common law, in allowing the defense of good faith and probable cause to arresting officers sued for false imprisonment, in effect interposed a negligence standard (plus a requirement of subjective good faith) for police arrests, in contrast to the strict approach by the underlying false imprisonment tort that the detention or confinement merely be intended, however innocently. In *Pierson*, this Court tracks this common law adjustment of liability exposure.

the risk of some error and injury. A balance was struck curtailing the immunity of such executive officials from the absolute scope which the court below had accorded. Instead, a qualified immunity was granted to executive officials for discretionary acts performed in the course of official conduct, subject to "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, [as they reasonably appeared at the time], coupled with good faith . . . ," *Scheuer*, 416 U.S. at 248. It was further provided as to higher executive officers that, "[l]ike legislators and judges, [they] are entitled to rely on traditional sources for the factual information on which they decide and act," *Scheuer*, 416 U.S. at 246, and that the broader and more subtle options which they must consider call for variations in the scope of this qualified immunity "dependent upon the scope of discretion and responsibilities of the office," *Scheuer*, 416 U.S. at 247.

The requirement evolved by *Scheuer* that executive officers possess reasonable grounds for their discretionary actions is essentially equivalent to a standard of reasonable conduct set in terms of negligence precepts. While these precepts require that investigation be undertaken before engaging in conduct involving unreasonable risks to others whenever this precaution will reduce such risks to reasonable proportions, it is also recognized that precautionary measures should not be required to an extent prohibitively burdensome upon conduct possessing social value.[20] Since decisive emergency action by high executive officials possesses considerable social value and would plausibly be unduly hampered by a requirement that

[20]As Prosser states: "consideration must . . . be given to any alternative course open to the actor. Whether it is reasonable to travel a dangerous road may depend upon the disadvantages of another route . . . A railroad need not do without a turntable because there is some chance that children will play on it and be hurt; but it is quite another matter to keep it locked." Prosser, *ibid*, §32 (*Unreasonable Risk*), p. 148-149.

action be preceded by investigation to minimize risks to others, the foregoing negligence precepts appear consistent with the determination in *Scheuer* entitling such officials to rely on traditional sources for information to use in deciding upon possible action. As an exeecutive official facing discretionary choices enters the process of deciding whether and how to act, negligence precepts would call upon the official reasonably to weigh his available options, both in terms of how effectively each might contribute to the public good and in terms of the types and amounts of risk which each apparently would pose to people affected. So long as the official then selects a course of action which he reasonably determines, from the foregoing weighing process, to be optimal among available options in possessing social value comparatively weighty in relation to whatever risks may be posed thereby, negligence standards would permit him to act with impunity. The *Scheuer* requirement that executive officials possess, in addition to good faith, reasonable grounds for their discretionary actions appears to point towards such a standard of conduct.

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court fashioned a similar qualified immunity for school administrators and board members, insulating them from monetary liability under §1983 for "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason," *Wood*, 420 U.S. at 321. Acknowledging that some degree of immunity is needed to encourage such officials to exercise their judgment "independently, forcefully, and in . . . the long term interests of the school and the students," *Wood*, 420 U.S. at 320, this Court also pointed to the prevailing common law view which accords such officials only a qualified immunity due to a determination that total immunity would not further enhance forthright action sufficiently "to warrant the absence of a remedy for students," *Wood*, 420 U.S. at 320. In the context of the alleged procedural due process violation by school board members therein, this Court specified further as to the

requirement of reasonableness that such board members must be held to "knowledge of the basic, unquestioned rights of [their] charges," *Wood*, 420 U.S. at 322, explaining that this standard of knowledge posed on unfair burden on holders of a public office requiring considerable intelligence and judgment, and that "[a]ny lesser standard would deny much of the promise of §1983," *Wood*, 420 U.S. at 322. This Court formulated this standard to withhold immunity from a school board member who "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the students affected,"[21] *Wood*, 420 U.S. at 322. The duty of inquiry implicit in this standard of knowledge clearly tracks the negligence precept calling for reasonable preparation before acting whenever the unreasonable risk of harm to others will thereby be averted or reduced to acceptable proportions. The more general standard that action by school officials must remain within the bounds of reason appears, as with the similarly phrased standard in *Scheuer*, to call for the sort of reasonable decision-making, involving the weighing of available options as to their respective risks and comparative merits, which is spelled out by negligence precepts.

B. The Circuits Have Applied This Standard Consistently With Decisions By This Court

In essential harmony with *Pierson v. Ray*, supra, *Scheuer v. Rhodes*, supra and *Wood v. Strickland*, supra, nearly every

[21] In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), this Court extended to a state mental hospital director this standard of knowledge concerning the constitutional rights of one's charges.

Circuit[22] has recognized that the damages remedy which §1983 provides for constitutional harm is not confined to wrongful conduct by state officials which intentionally affect constitutional interests but instead reaches conduct which poses unacceptable risk in some degree, ranging from recklessness to ordinary negligence.[23]

[22]The Seventh Circuit is the only Circuit that presently even approaches disavowing negligence in any degree as a cognizable basis for §1983 damages claims for infringement of constitutionally guaranteed interests. See: *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) [inconsistent dicta as to negligence]; *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) [greater culpability than mere negligence]; *Jenkins v. Meyers*, 238 F. Supp. 383 (N.D. ILL. E.D. 1972), aff's 481 F.2d 1406 (7th Cir. 1973) [strict liability as to constitutional interest provided factual result intended]; *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972) [negligent omission], limited in *Bonner v. Coughlin*, supra (7th Cir. 1976) [confined to facts indicating purposeful nonfeasance].

[23]FIRST CIRCUIT: *Harper v. Cserr*, 544 F.2d 1121 (1st Cir. 1976) [wanton neglect]; *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974) [high degree of neglect]; SECOND CIRCUIT: *Williams v. Vincent*, 508 F.2d 541 (2nd Cir. 1974) [recklessness or deliberate indifference]; *Wright v. McMann*, 460 F.2d 126 (2nd Cir. 1972) [facts indicate negligence or recklessness]; THIRD CIRCUIT: *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972) [negligence], limiting *Kent v. Prasse*, 265 F. Supp. 673 (N.D. Pa. 1967), aff'd, 385 F.2d 406 (3rd Cir. 1967); FOURTH CIRCUIT: *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972) [negligence]; *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970) [gross negligence]; FIFTH CIRCUIT: *Bryan v. Jones*, 530 F.2d 1210 (5th Cir. 1976) [high degree of reasonableness]; *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) [negligence]; *Parker v. McKeithen*, 488 F.2d 553 (5th Cir. 1974), cert. den. 419 U.S. 838 (1974), [gross negligence]; *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972) [negligence]; *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972), modified, 456 F.2d 834 (5th Cir. 1972), cert. den. 404 U.S. 866 (1972) [negligence]; *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1968), cert. den. 396 U.S. 901 (1969) [unreasonable inadvertance]; SIXTH CIRCUIT: *Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972) [negligence]; *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972) [negligence impliedly acknowledged]; EIGHTH CIRCUIT: *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973) [aggravated if not simple

(continued)

In applying negligence law to §1983 claims, the lower federal courts have demonstrated that these precepts can furnish a foundation for sensitive weighing from a federal perspective of such policy considerations as the degree of duty concerning constitutional interests appropriate to impose on state officials.[24] These judicial decisions demonstrate that for negligent no less than intentional infringement of such interests, monetary liability under §1983 can be imposed as a contained and measured response to substantial constitutional harm.

Constitutional deprivation weighs heaviest in the scales of negligence doctrine where supervisorial conduct is involved, particularly where the conduct in question concerns the creation and supervision of administrative practices. Thus in *Roberts v. Williams*, supra, the court considered the grossly negligent shooting of a jail farm inmate by a trusty guard who, wholly unskilled in handling his shotgun, had inadvertantly pointed it in plaintiff's direction with the safety accidentally off. Upholding the verdict on a pendant claim which found the jail farm superintendant negligent in failing to train this trusty guard beyond a brief admonition to be careful, the court went on the rule the superindentant liable under §1983 for violation of plaintiff's Eighth Amendment rights. Acknowledging that ordinary negligence was insufficient to show cruel and unusual punishment, the court concluded the superintendant's conduct to be more aggravated

(footnote continued from preceding page)
negligence]; *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973) [negligence]; NINTH CIRCUIT: *Navarette v. Enomoto*, 536 F.2d 277 (9th Cir. 1976) [decision below]; TENTH CIRCUIT: *Dewell v. Larson*, 489 F.2d 877 (10th Cir. 1974) [negligence]; D.C. CIRCUIT: *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), rev'd (on other grounds), sub nom *District of Columbia v. Carter*, 409 U.S. 418 (1973) [negligence].

[24]Some decisions, however, have applied negligence law with little consideration of involved interests from perspective of pertinent federal policies. See generally: S. Nahmod, *§1983 and the Background of Tort Liability*, 50 Indiana L. J. 5 (1974-75)

because it amounted to "a wrong in prison management, in contrast to the casual dereliction of a minor prison employee," *Roberts*, 456 F.2d at 827. This supervisorial conduct amounted to "callous indifference to [suffering] at the management level . . . in the sustained maintenance, over a period of time, of a needlessly hazardous condition for plaintiff and other prisoners," *Roberts* 456 F.2d at 827.[25] The court took a more restrained view of the comparatively remote involvement of the county supervisors in this trusty guard system. The supervisors could be liable for negligence consisting in a "clear breach of duty that led to the plaintiff's injury" but not for "a good faith, reasonable choice among valid policy alternatives, even if an unwise one," *Roberts*, 456 F.2d at 830. Although the supervisors had taken no formal action whatsoever to implement their statutory duty to supervise the jail farm, they were ruled not liable therein because their reliance on the expertise of the county farm superintendant, by acquiescing in his use of the trusty guards, was deemed reasonable.

In *Bryan v. Jones*, supra, the plaintiff sought damages for deprivation of liberty due to his incarceration for more than a month after the district attorney had dismissed charges, despite plaintiff's repeated inquiries to jail personnel. Although the court clerk had promptly notified the sheriff of plaintiff's dismissal, the sheriff persisted in his mistaken belief that plaintiff still had other pending charges because the committing warrant held by the sheriff was misnumbered. In weighing these facts, the court adroitly blended negligence law

[25]An addendum to this decision, *Roberts*, 456 F.2d at 835, reduces the Eighth Amendment ruling from a holding of federal liability on that ground to "a discussion of the meaning of the Eighth Amendment . . . relevant primarily in . . . [determining] that the complaint should [not] have been dismissed for failure to state a federal claim." In any case, this application of the Eighth Amendment appears to have been substantially vindicated by the "deliberate indifference" standard adopted in *Estelle v. Gamble*, supra.

with the §1983 doctrine of qualified immunity. Holding that the sheriff was prima facie liable under §1983 for intending the mere fact of plaintiff's continued confinement,[26] the court remanded the matter for determination of whether the sheriff possessed the qualified immunity for reasonable good faith. The court noted in this regard that "the degree of discretion is relevant to determining what standard of reasonableness will be used," *Bryan*, 530 F.2d at 1214, and further explained:

> "In a case such as this one where there is no discretion and relatively little time pressure, the jailer will be held to a high degree of reasonableness as to his own actions. If he negligently establishes a record keeping system in which errors of this kind are likely, he will be held liable. But if the efforts take place outside his realm of responsibility, he cannot be found liable because he has

[26]This requirement of intended factual result, imported from the underlying false imprisonment tort, is subject to question as inconsistent with federal considerations. To begin with, the statutory language of §1983 admits of no room for requiring a certain state of mind as an element of causes of action arising thereunder. (see: Respondent's Brief, supra, at p. 17). Moreover, although this required intent be limited in scope, any compatibility thereof with federal policy is purely coincidental. At most, this requirement, in disqualifying some claims, coincides with a general federal interest in limiting the influx of §1983 litigation. However, this effect of said requirement falls easily into cross-purposes with the particular aims of this civil rights statute to deter unconstitutional conduct and compensate constitutional harm. A variation of the facts considered in *Bryan* illustrates such cross-purposes: this intent standard would have insulated the sheriff from liability if he had promptly ordered his subordinates to release the plaintiff but, due to his negligent establishment of error-ridden procedures for effectuating the release of prisoners, this release order was lost or mislaid during transmittal down a chain of subordinates and plaintiff consequently was not released for another month.

acted reasonably and in good faith." *Bryan*, 530 F.2d at 215.[27]

This emphasis on the managerial character of the duties of modern sheriffs is further focused by the explanation, *Bryan*, 530 F.2d at 1217 (Brown, Chief J. concurring) that the sheriff can avoid liability for mistakes by establishing "a system that is reasonably watertight, that makes the functionaries check all sources of possible releases of prisoners, and a system for collecting this information and transferring it to the supervisors".

Questions concerning other information-gathering administrative practices were considered in *Dewell v. Lawson*, supra, in which the plaintiff had been arrested for public drunkenness when found wandering through the streets in an acute diabetic condition, following which plaintiff was incarcerated for four days until he lapsed into a coma, the jail personnel having been untutored in diabetic symptoms and also unaware of the all points bulletin for plaintiff as a missing person which his family had promptly caused to be issued. Relying on the Eighth Amendment, plaintiff sued the police chief for negligent failure to establish procedures advising jail personnel of such all points bulletins, to train such personnel in detecting diabetic symptoms, and to provide medically skilled staff for diabetic prisoners. The court ruled that a §1983 claim was stated by these allegations because

[27]Defendants' statement that *Bryan* limits *Whirl v. Kern*, supra (Appellant's Brief, p. 18, n. 26) is misleading. *Whirl* involved the similar facts of a prisoner languishing in jail for nine months after his case had been dismissed because the sheriff inexplicably failed to process a list of dismissed cases supplied by the court clerk. *Whirl* ruled identically to *Bryan* in deeming the sheriff to be prima facie liable, and then expressly invoked federal policy to insulate the sheriff from liability if such errors be discovered within a reasonable time. *Bryan* departs from *Whirl* only in differently defining the reasonableness requisite for such immunity, and in further conditioning immunity upon the presence of subjective good faith.

the alleged negligence of the police chief "in not supervising his subordinates" could amount to a sufficiently shocking or arbitrary "failure to procure urgently needed medical attention . . . [to] amount to cruel and unusual punishment," *Dewell*, 489 F.2d at 881-882.[28]

Similar decisions deal with other prison administrative practices. In *Wright v. McMann*, supra, the court upheld an award of damages under §1983 against a prison warden for failing to rectify the array of inhumane conditions existing in disciplinary isolation cells. Although the warden had not personally committed plaintiff into isolation, enough suggestive information filtered back to the warden to give him cause at least to suspect the conditions to which inmates were being subjected by this disciplinary practice. The court thus ruled that the warden "knew or should have known that [plaintiff] was being forced to live in [unconstitutionally inhumane] conditions", *Wright*, 460 F.2d at 135.[29] In *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974), the court ruled that a valid §1983 claim for damages could be stated in relation to an "unreasonable continuation of a widespread prison lockup

[28]The possibility of a similar systematic deficiency is noted in *Estelle v. Gamble*, supra, 50 L.Ed.2d at 264 (Stevens, J. dissenting opinion): "[I]t is surely not inconceivable that an overworked, undermanned medical staff in a crowded prison is following the expedient course of routinely prescribing nothing more than pain killers when a thorough diagnosis would disclose an obvious need for remedial treatment."

[29]The court went on to give this response to the contention by defendant therein that capable personnel would be deterred from taking prison jobs if the damage award were upheld, *Wright*, 460 F.2d at 135: "We are not moved by the suggestion that if we uphold liability today competent people tomorrow will refuse to become superintendants . . . In the unlikely event that a prospective superintendant in fact turns down an offer for fear of personal liability, we think that the position is probably better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit." Defendants herein raise the same contention (Petitioners' Brief, p. 16). Dubious as to supervisory officials, the contention may have some merit as to subordinate prison personnel (see p. 49, infra).

after the termination of an emergency" where a prolonged "deprivation of hygenic necessities, writing materials, work opportunity, [or] . . . access to counsel and church services" could be shown to result from "*such a degree of neglect* or malice . . . as to deprive [the prison warden] of official immunity for merely erroneous action," *Hoitt*, 497 F.2dat 601, (italics supplied).

In *Brown v. United States*, supra, the court undertook a negligence analysis which recognized institutional limitations to such supervisorial liability. The §1983 claim therein involved sought damages from the sheriff and head jailer due to two assaults which plaintiff sustained while incarcerated in defendants' concededly overcrowded and understaffed jail. Although uncertain as to the degree of negligence for which §1983 defendants may be liable, the court averted any need to decide this question by weighing the circumstances therein. Pointing to defendants' repeated efforts to obtain help from responsible agencies in alleviating the substandard jail conditions which had obviously contributed to the assaults, the court ruled:

> "Given the limited means and facility they had at their disposal it appears that both [defendants] . . . exercised all care one could reasonably expect of them . . . To the extent that [defendants] may have had a duty to do something more than administer an inadequate facility as best they could, we find that they discharged that duty." *Brown*, 486 F.2d 287-88, 288, n. 4."

Where circumstances disclose that a contributing cause to constitutional harm produced by subordinate officials consists in the failure by the officials charged with supervising such subordinates either to provide reasonable training, or to discipline or control particular subordinates for whom reason exists to suspect unconstitutional conduct, negligence principles indicate that such supervisory officials should be liable in damages for the constitutional harm to which they thereby contributed. Thus in *Carter v. Carlson*, supra, where police

officers arrested plaintiff without probable cause and beat him unnecessarily with brass knuckles, plaintiff included supervisory officers in his §1983 damages claim, alleging that they failed to train, instruct, and supervise the arresting officers as to probable cause criteria for arrest and the limits of permissible force in effecting arrests. Acknowledging that a potentially valid claim was thus stated against the supervisory officers, the court remanded this claim to develop more specific evidence concerning the character and distribution of training and supervision duties. Similarly in *Beverly v. Morris*, supra, the court sustained a verdict awarding damages against a police chief for failure properly to train and supervise an auxiliary officer who had arrested and then beaten plaintiff with a blackjack. Deeming this claim to be sufficient since founded in negligence of the police chief himself, the court also held the verdict fully supported by "evidence [which] shows a complete absence of any supervision or training of the auxiliary police officer," *Beverly*, 470 F.2d at 1357. And in *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976), where the black plaintiff had been unlawfully arrested and physically abused by several police officers, the court deemed valid the §1983 damages claim against the police chief, mayor, and members of a police review committee, alleging that these officials possessed supervisory duties under local law which included controlling or disciplining police misconduct, and that they "knew or should have known of . . . prior violent misconduct against blacks" by one of the arresting officers, in that complaints to this effect had previously been brought to the attention of these supervisory officials, *Sims*, 537 F.2d 831. In harmony with the foregoing decisions, *Jennings v. Davis*, supra, acknowledged that the police chief and other supervisory officials possessed affirmative duties "to prudently select, educate, and supervise police department employees" *Jennings*, 476 F.2d at 1275, but ruled insufficient the allegations therein that these supervisory duties had been negligently breached when a civilian clerk at the police station had ridiculed plaintiff and subjected her to an unnecessary

personal search following her arrest on a minor traffic charge. To hold these supervisory officials thus accountable for such "an isolated, spontaneous incident [would be] . . . beyond reason," *Jennings*, 476 F.2d at 1275.

The lower federal courts have been less ready to impose monetary liability on subordinate officials where their negligent conduct infringes constitutional interests. These judicial decisions tend to confine such liability to official conduct which exposes individuals repeatedly to the same risk, which entails a more aggravated degree of risk, or which involves risk of particularly serious forms of constitutional harm.

In *McCray v. Maryland*, supra, the court upheld a §1983 action by a prisoner for damages from a court clerk who negligently impeded the filing of plaintiff's petition for post-conviction relief. The court refused to fashion a more lenient liability standard, pointing out that the common law generally exposed ministerial conduct to liability for negligent failures to perform.[30] In further justification of this negligence standard, the court deemed it not unduly inhibitory in that court clerical personnel were already exposed to fines under a state law directed at such neglect, and stressed the strong constitutional interest therein jeopardized:

> "Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who, by refusal or neglect, impedes the filing of his papers?" *McCray*, 456 F.2d at 5.

[30]The court added that qualified immunity under §1983 might be extended to ministerial officials who infringe constitutional rights while discharging statutory duties. This caveat seems to suggest some degree of immunity akin to the *Pierson* immunization of police officers making arrests under statutes they reasonably believed valid, but later held unconstitutional.

In *Jenkins v. Averett*, supra, the court upheld §1983 liability of a police officer who, catching up to an innocent youth after chasing him with gun drawn, accidentally shot the youth as the officer lowered his gun. The court deemed plaintiff's Fourth Amendment rights to have been violated by this arbitrary infliction of physical injury. In rejecting "the spectre raised in the dissent that our opinion contemplates a constitutional remedy for all state-perpetrated negligence," the court emphasized both that the conduct of the officer amounted to wanton or gross negligence rather than simple negligence or inadvertance, and that the injury was inflicted "in the course of [the officer's] attempt to apprehend the plaintiff," *Jenkins*, 424 F.2d at 1232.[31] In *Williams v. Vincent*, supra, the court considered the alleged negligence of

[31]By stressing that the injury was inflicted in the course of the officer's attempt to apprehend plaintiff, *Jenkins* appears to limit Fourth Amendment violations cognizable as §1983 damage claims to injury-causing actions which, otherwise qualifying, arise from an underlying course of official conduct directed at the plaintiff. Akin to the prima facie requirement of intentional confinement in *Bryan v. Jones*, supra, in requiring a minimal underlying focus on the plaintiff, this requirement of underlying purpose screens from §1983 the claims of such negligence victims mentioned in the *Jenkins* dissent as bystanders and passing motorists injured during police action, in that such peripheral plaintiffs contrast with the *Jenkins* youth in never being the intended object of the underlying official course of action. The permieter thus drawn around cognizable §1983 claims by this underlying purpose test resembles the prevailing common law immunity doctrine limiting cognizable claims against public officers for their ministerial negligence to plaintiffs possessing "special, direct, and distinctive interest[s]" in performance of the involved ministerial duties. 67 C.J.S., *Officers*, §1277, p. 422-23. The within claims meet this underlying purpose test in that the underlying course of mail regulating conduct by all defendants was intended to affect plaintiff together with all other state prisoners. In contrast to this limited notion of underlying purpose as a parameter for at least some §1983 claims, the more encompassing requirement of intent which defendants insist should delimit §1983 claims would extend to the consequences of the particular injury-causing act: a §1983 claim would thus exist only where the state official desires or is substantially certain that his action will inflict the constitutional harm in question.

a prison guard who, while in the company of a prisoner, failed to protect him when the latter was attacked by another inmate. Holding that this isolated omission by the guard could subject him to monetary liability under §1983 only under "circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his control," *Williams*, 508 F.2d at 546, the court applied these standards to observe that the claim therein lacked needed allegations that this guard either had a history of similar behavior or, following his reflexive retreat when the attacker first struck, the guard simply stood by and allowed the attack to continue.

In *Jenkins v. Meyers*, supra, the court reached a holding which curtailed the negligence liability of subordinate prison officials by denying their accountability for inadvertance as to the factual results of their conduct.[32] Denying liability for

[32]In excluding inadvertance as a basis for §1983 liability, *Jenkins* is in seeming conflict with *McCray v. Maryland*, supra. *McCray* never specified what conduct of the court clerk therein amounted to negligence, and hence the holding therein appears equally to apply whether the clerk inadvertantly failed to file plaintiff's pleading, or whether the nonfiling was intended due to some negligent misunderstanding of the surrounding circumstances. *McCray* thus imposes liability on all negligent conduct, while *Jenkins* reaches only some negligence. A reconciliation of these differing standards might be ventured by contrasting the constitutional interests respectively involved: while both decisions concerned legal correspondence, the court clerk occupied a more critical spot than the prison guards, being gatekeeper to the final commmon destination of all prisoner legal efforts. This pivotal significance of the court clerk's conduct for effective access to the courts, emphasized in *McCray*, justifies imposition of unrestrained negligence liability both for compensatory reasons as well as to give court clerks maximum incentive to evolve prudent practices in processing incoming pleadings. However, apart from any such reconciliation of *Jenkins* with *McCray*, respondent elsewhere questions this requirement adopted in *Jenkins* that the factual result be intended (See footnote 26, supra, and footnote 33, infra).

prison officials who failed to mail a prisoner's transcript to his attorney, but instead inadvertantly enclosed the transcript with another prisoner's outgoing letter, to a relative, the court voiced concern, *Jenkins*, 338 F. Supp. at 390, that

> "to apply the tort law en masse to §1983 . . . would convert every minor mistake, especially in the milieu of a prison, into a violation of §1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable."

The court factually distinguished the unjustifiably prolonged incarceration in *Whirl v. Kern*, supra, as involving "a certain threshold congnizance of the act being performed, albiet an innocent one," *Jenkins*, 338 F. Supp. at 389. The court declared itself to be ruling out liability only in

> "cases where there is a deprivation of a constitutional right but the act bringing about that violation was an unconscious one, a pure mistake, and the factual as well as the legal result were unintended . . ." *Jenkins*, 338 F. Supp. at 389.[33]

[33]The *Jenkins* court confirmed that it considered *Whirl* to govern the result therein by further noting that the defendants therein would have been deemed liable if, as in *Whirl*, they had intended purely the factual result by "intentionally mail[ing] plaintiff's transcript to a wrong address thinking it was perfectly legal to do so and . . . not a denial of [the constitutional right of access]," *Jenkins*, 338 F. Supp. at 389. This adherence to *Whirl* parallels the fact that both decisions are similarly riveted to the underlying common law: just as the *Whirl* requirement of intended factual result is linked to false imprisonment, the corresponding *Jenkins* requirement mirrors the tort of conversion. Cf. Prosser, supra, §15, p. 83. As respondent has argued as to the factual intent required by both *Whirl* and *Bryan* (footnote 26, supra), importing this requirement from the common law contravenes the statutory language of §1983, and risks running afoul of other federal considerations. Indeed, the "threshold cognizance" required in *Jenkins* is singularly inappropriate in (at least) two respects. Firstly, in ironic contradiction to the policy concern of *Jenkins* (quoted in text hereinabove) with averting a "high standard of strict liability" for prison officials, *Jenkins* imposes this very standard to the extent of following conversion law in

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In similar vein to *Jenkins v. Meyers*, supra, the court in *Bonner v. Coughlin*, supra, denied liability for harm inadvertantly caused by prison officials. The defendant prison guards therein had unintentionally left open the door to

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conceding liability for innocent mistakes by prison officials as to the legal effect of their actions. Cf. Prosser, *ibid.* Such imposition of strict federal liability is indeed devoid of any prophylactic value in encouraging the adoption of prudent investigation procedures where constitutional rights are concerned, and flies in the face of the reasonableness standards adopted in *Whirl* and *Bryan* for information processing by sheriffs as to the legal effect of their continued incarceration of inmates, as well as in *Wood v. Strickland*, supra, for inquiry by school officials into established constitutional standards bearing on the legality of their contemplated actionss. Secondly, the *Jenkins* "threshold cognizance" standard distinguishes factual results actionable under §1983 from those that are not in a manner little relevant to the deterrence and compensation functions of this civil rights statute. While it may concededly be argued that this *Jenkins* standard serves deterrence since the threat or imposition of monetary liability has more deterrent effect on action where at least the factual result is intended than on inadvertant action, this argument seemingly possesses weight only when inquiry is limited to the specific injury-causing act or omission. The conclusion melts away upon scrutiny of the surrounding course of conduct. A prison official who commits an inadvertant mailing error due to his correctably careless practice in processing prisoner mail would respond to liability by elevating his degree of care in handling mail far more predictably than would an official who, despite his generally impeccable mail processing, makes a good faith albiet intended mailing error. Indeed, a distinction between forms of negligence drawn in terms of the deterrent purpose of §1983 would undoubtedly put more priority on rendering liable any chronically careless prison official, because of the comparatively widespread harm risked by his repeated mailing errors, whether the errors be inadvertant or intentional, than the official whose mailing errors of any sort are infrequent aberrations from his usual prudent practice in handling prisoner mail. The *Jenkins* standard is also patently irrelevant in weighing, from the standpoint of the compensatory purpose of §1983, the magnitude of constitutional harm caused: intended errors may block letters of minor import as easily as critically important mail may fall victim to inadvertant error.

plaintiff's cell as they departed after completing a security search inside, following which plaintiff's trial transcript was stolen from the cell. The court ruled alternatively that "the negligence of the guards which caused the loss of [plaintiff's] transcript was not a State deprivation of property without due process . . . nor action 'under color of state law' under §1983," *Bonner*, 545 F.2d at 567. As to the first stated ground, the court concluded that plaintiff's reliance on the "substantive aspect of due process" amounted to an "ex proprio vigore extension [thereof] . . . that the Supreme Court rejected in [*Paul v. Davis*]," *Bonner*, 545 F.2d at 567. The court concluded, in discussing its second stated ground, that "any causation between the negligence of the prison guards . . . [and plaintiff's] transcript loss was insufficient to satisfy §1983.[34] In sweeping dicta, the court also speculated

[34]This second ground of the court's ruling untenably intertwines the disparate concepts of state action, color of law, and causation. Initially observing that state action ended "when the guards left the cell," and that "color of law" was lacking because the guards "neither encouraged nor condoned the taking of the transcript," the court only then concluded [quote appears in text hereinabove] that there was no sufficient causal link between the guards' negligence and the transcript theft. However, the concept of "state action" does not directly concern causation. Involved in determining the applicability of Fourteenth Amendment guarantees to private action, "state action" instead concerns the quantum and character of supportive involvement in private action by state government Cf. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). Likewise, the concept of "color of law" deals not with the consequences of conduct by state officials, but rather with whether the conduct itself is sufficiently clothed with official character to come within the purpose of §1983. Cf. *Monroe v. Pape*, supra. *Bonner* should therefore have considered the sufficiency of the link between the guards' conduct and the transcript theft purely in terms of the causation required by §1983. Moreover, even insofar as *Bonner* expressly addressed the causation question, the court inappropriately supported its conclusion that the guards' actions were insufficiently linked to the ensuing theft by reciting that "the guards' actions were [n]either intentional [n]or in reckless disregard of [plaintiff's] constitutional rights," *Bonner*, 545 F.2d at 567. It is clear that, in
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that negligence may be generally inappropriate as a basis for §1983 claims. However, the court firmly concluded only that §1983 should be inaccessible as to "negligent conduct,

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determining what harm is sufficiently caused by official conduct, the official's state of mind is not a defining criterion. (see Respondent's Brief, supra, at p. 17) Cf. *Bonner*, 545 F.2d at 572 (Swygert, J. dissenting). Further, the apparent reference in this supporting statement to the standard from *Wood v. Strickland*, supra, as to required knowledge of constitutional rights, fundamentally misconstrues that standard. Said standard addresses the degree of an official's awareness of the *legal consequences* of his actions, not the *factual result* thereof, and specifies the boundary between immunity and liability to be the *unreasonable* ignorance of constitutional rights, not the *reckless* disregard thereof. *Wood*, 420 U.S. at 3222. *Bonner* should have pursued a causation analysis geared to the *Rizzo* requirement that some "direct responsibility" or "affirmative link" be shown between the official, conduct and the ensuing harm before liability is imposed. *Rizzo*, 423 U.S. at 371, 376. Such a causation analysis calls for closer scrutiny of the surrounding circumstances than undertaken in *Bonner*. Inquiry should have been made into what orders or other locally prescribed duties the guards possessed regarding the securing of cells after searching therein, as well as how pronounced or foreseeable was the risk under the circumstances that another prisoner would happen by and exploit the opportunity posed by this unlocked cell to steal the transcirpt. Sufficiently related to the requirement set forth by *Rizzo* to offer suggestive guidance, standard tort precepts indicate the following approach for inquiry into whether harm proximately resulted from negligent conduct where the criminal act of a third person intervened: "Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it . . . It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent," Restatement, Torts, Second, §302B (*Risk of Intentional or Criminal Conduct*), §449 (*Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent*).

without more, resulting in an injury to a property right." *Bonner*, 545 F.2d at 568, n.8. Accordingly, the court stated concerning the within decision below: "If *Navarette v. Enomoto* does concern mere negligence, we respectfully disagree. However, *Navarette* apparently concerned negligent conduct resulting in the deprivation of the prisoner's 'fundamental and reasonably well defined constitutional rights'," *Bonner*, 545 F.2d at 569.[35]

C. The Conduct of the Within Defendants Should Be Governed By This Standard

In light of the foregoing immunity decisions by this court and negligence decisions by lower federal courts, the following contentions can be made concerning the liability standard

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[35]The dissent, *Bonner*, 545 F.2d at 569, 573 (Swygert, J. dissenting), recognized the need somehow to screen "the barrage of frequently insignificant prisoners' complaints" lest the federal courts become the day to day supervisors of state prison systems," proposing that the selection criteria should not consider whether the official conduct was negligent or intentional, but rather should face "the nature and extent of the hardship imposed on the inmate." Turning to the "color of law" requirement, the dissent suggested that a distinction be drawn thereunder between governmental and incidental activities of prison personnel, the former category including official conduct related to "security, discipline, and . . . a prisoner's First Amendment activities . . . *[such as] censorship of mail*," (italics supplied) and the latter involving the "providing [of] food, shelter, exercise facilities, safety measures, and a host of other incidentals," *Bonner* 545 F.2d at 575. Harm caused by official conduct in the governmental area would inherently meet the "color of law" requirement, whereas harm suffered due to conduct of incidental character could give rise to a §1983 action only if more than a single instance of simple negligence were involved.

appropriate for the within defendants in the context of their regulation of constitutionally protected prisoner mail.[36]

1. The supervisory defendants

To the extent that the conduct of the within supervisory defendants affecting the obstruction of plaintiff's mail amounted to discretionary decisionmaking, these defendants are required by the rulings in *Scheuer v. Rhodes*, supra, and *Wood v. Strickland*, supra, to have functioned in a reasonable manner. It remains to fix the degree and character of the reasonableness required before any such supervisory officials can be insulated from liability for constitutional harm caused by failure to train and direct their subordinates.

In stating that the extent of executive immunity should vary in proportion "to the scope of discretion and responsibility of the office, *Scheuer*, 416, U.S. at 247, this court evinced a policy concern for averting an excessive liability burden on higher executive officials, a concern particularly appropriate in contexts of rapid decisionmaking by high executive officials under emergency circumstances. However, this consideration should not be frozen into a "fixed, invariable rule of immunity," *Doe v. McMillan*, 412 U.S. 306, 320 (1973), which assures higher executive officials, such as the within supervisory defendants, of a comparatively broad immunity under all circumstances. Rather, as this court recognized, in *Doe*, 420 U.S. at 320, concerning official immunity at common law, the scope given immunity depends on

[36]Plaintiff shall argue in Part III, infra, that his obstructed mail was provably protected by clearly established constitutional guarantees of free expression and due process – constitutional protection of which defendants knew or reasonably should have known. It is assumed hereinabove that this argument is accepted by this Court.

> "a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens."

From this flexible perspective, account should be taken herein of the fact that these supervisory defendants, in shaping and supervising a system for regulating prisoner mail, possessed time for deliberation and review which was patently unavailable to the high officials in *Scheuer*. A parallel contrast between the relatively leisurely conduct of sheriffs in relation to their jails, and the pressure faced by policemen on the beat to make quick, stressful decisions, was deemed in *Whirl v. Kern*, supra and *Bryan v. Jones*, supra, to call for signifcantly less insulation of jailers than police from liability. This consideration points toward requiring herein a higher degree of reasonableness than called for by the circumstances considered in *Scheuer*. Moreover, in terms of the above-quoted reference in *Doe* to the risk of recurring harm,[37] the reasonableness required of the state director should be comparatively stringent because of the vast range of prisoners throughout California whose constitutional mail interests are affected by his conduct concerning the within regulatory system.

Another factor influencing immunity consists in whether discretion is actually exercised. Where circumstances demand the considered exercise of discretion, but the official action or inaction is nonetheless unfounded on any deliberate choice between options, such conduct stands bereft of the policy considerations undergirding the extension of immunity to executive officials. This point is cogently made in *Scheuer*, 416 U.S. at 241-242:

[37]The law of negligence likewise considers the number of people potentially harmed in fixing the level of reasonableness required by particular conduct (Respondent's Brief, supra at pp. 23).

> "[T]he public interest requires decisions and action to enforce laws for the protection of the public . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices."[38]

Accordingly, to the extent that pertinent conduct of the within supervisory defendants concerning prisoner mail regulation is found to be nondeliberative in character despite circumstances calling for discretionary decisionmaking, a case can be made for liability without more for resulting constitutional harm. More moderately, such nondeliberative conduct should at least be measured by the same high standard of reasonableness as *Bryan* imposed on the essentially ministerial supervisory work of the sheriff therein.

In its perspective on the appropriate character of a reasonableness standard, *Bryan* displayed a sensitivity to the character of personal responsibility within modern bureaucracy which is equally appropriate herein in assessing the involvement of the within supervisory prison officials in this

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[38]The California Supreme Court reached a parallel conclusion in *Johnson v. State of California*, 69 Cal. 2d 782, 794, n.8., 73 Cal. Rptr. 240, 447 P.2d 352 (1968), when considering governmental immunity in relation to a juvenile parole officer who, without consciously weighing countervailing considerations failed to warn a foster family of the dangerous propensity of a juvenile placed with them:

> "[T]o be entitled to immunity the state must make a showing that . . . a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."

A related view is expressed in 63 Am. Jur. 2d, *Public Officers and Employees*, §289 [negligence liability for officers exercising ministerial functions even where they also possess discretionary duties].

statewide system of prisoner mail regulation. Where supervisorial responsibility includes devising or adjusting a regulatory system, the operation of which touches constitutional interests, a significant dimension of this responsibility must consist in the effectiveness of the system in avoiding undue infringement on constitutional interests while serving the legitimate ends for which it was established. Insofar as a system synchronizes essentially ministerial functions, its effectiveness on this score can simply be measured in terms of the dearth or abundance of errors trenching upon constitutional interests. Procedures for the physical processing of mail can thus appropriately be assessed in terms of the frequency with which letters are inadvertantly lost. Insofar as a system instead coordinates discretionary decisionmaking by subordinate officials, assessing effectiveness of the system is a more subtle task which should focus on reasonableness of supervisory effort to minimize systemic deviation of regulatory decisions from constitutional criteria. Such considerations herein may reasonably have required written guidelines (and training insofar as necessary) explaining established constitutional criteria, together with some procedure for administrative review of censorship decisions by subordinates.[39]

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[39]If the state director's bulletin of August 10, 1972 (see footnote 8, supra) is proved to constitute the first effort by this defendant to apply constitutional criteria generally to prisoner mail censorship, an issue will thus be posed of whether said defendant conducted himself reasonably in delaying until that date in taking any affirmative step to implement these established criteria. Relevant to this issue in terms of institutional capacity for prompt adjustment of prisoner regulations was the state director's prompt issuance of revised regulations (R 146-147) in the wake of *Johnson v. Avery*, 393 U.S. 493 (1969): "on March 19, 1969, less than a month after the *Johnson* decision was rendered, the Director's Rules were altered in an effort to conform to the constitutional requirements there enunciated," *In re Harrell*, 2 Cal. 3d 675, 684, 87 Cal. Rptr. 504, 470 P.2d 640 (1970). The issue as to reasonableness of such delayed response to clear constitutional developments could also invoke inquiry into whether the within supervisory defendants were sufficiently aware that subordinates were

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2. The subordinate defendants

It appears clear that subordinate prison officials should be held to some degree of reasonableness in their conduct before they can be accorded immunity under §1983. Where such officials engage in discretionary decisionmaking, this conclusion fairly follows from the limits which this Court thus imposed on police officers in *Pierson v. Ray*, supra, and on school administrative officials in *Wood v. Strickland*. As to the ministerial functions performed by such officials, this conclusion is strongly supported by the prevailing common law view that officials engaged in ministerial conduct should be liable for their negligent breaches of duty to persons to whom the duty is owed, 67 C.J.S., *Officers*, §125, 63 Am. Jur. 2d, *Public Officers and Employees*, §292, or who at least

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making constitutionally aberrant censorship decisions to require reasonably that the supervisory defendants should have earlier taken remedial action. Any such inquiry should consider these supervisory defendants to possess some affirmative responsibility to monitor the functioning of their system for mail regulation as a logically necessary concomitant of their involvement in shaping if not indeed erecting this system. Any lesser duty would bear the foul fruit of encouraging higher executive officials to direct that coordinated forms of subordinate activity be undertaken, and then, by isolating themselves from feedback on the execution of such directives, sidestep responsibility for all constitutional harm from any subordinate action that departs foreseeably from the coordinated activity as originally conceived. Herein, such system-engendered error could include negligent misinterpretation of state regulations (or rules of the particular prison) by decision-making subordinates, as well as their ignoring of applicable constitutional standards fostered by the continued privilege-not-right approach which existing state regulations took concerning prisoner mail interests. An affirmative duty to check for occurrence of such subordinate aberration can be distinguished from the more limited responsibility affirmed in *Sims v. Adams*, supra, and related cases (see pp. 34-36, supra) to rectify subordinate misconduct only when the supervisory officials are reasonably notified thereof by circumstances of which they are aware. The latter forms of subordinate misconduct are not intrinsically foreseeable, whereas the former are.

possess a "special, direct, and distinctive interest," in the performance thereof, 67 C.J.S., *Officers*, §127, p. 422-423.

In determining what degrees of reasonableness may appropriately be required in particular contexts, it must be acknowledged that the lower federal courts have frequently been sparing in their imposition of liability on lower prison officials. This judicial view concededly finds support in the fact that such lower officials potentially face a particularly broad range of liability exposure due to their intensive daily contact with virtually every aspect of prisoners' lives. However, to the extent that such considerable potential liability is determined to impair recruitment and retention of these necessary public functionaries or to be inappropriate for other policy reasons, a sufficient judicial solution is at hand short of engrafting an artificial requirement of intentionality onto the language of §1983. Negligence precepts offer the perspective that, given the undisputed social utility of the conduct of lower prison officials, a less stringent standard of reasonableness would be appropriate. The analysis undertaken in *Williams v. Vincent*, supra, indicates that such a reduced standard can be implemented by limiting liability to ordinary negligence accompanied by a history of similar behavior, and to isolated conduct only where more aggravated negligence is involved: in either case, the harm thereby risked weighs more heavily in the scales.

At the same time, it would appear inappropriate to reduce the negligence standard for constitutional harm caused by lower prison officials where, as herein, they face liability under state law for harm caused through ordinary negligence to prisoner interests recognized by common law. Cal. Gov. Code §844.6(d). Such state liability takes much of the force from the foregoing policy consideration that §1983 liability for negligently infringing constitutional interests of prisoners will dissuade people from seeking or remaining in prison employment. Conversely, there is no merit to defendants' suggestion (Petitioners' Brief at p. 14, n.21) that this state remedy itself sufficiently protects prisoner interests from

negligent infringement, thereby rendering superfluous any §1983 liability for negligent infringement of constitutional interests. Apart from the fact that sufficiency of any state remedy cannot defeat recourse to §1983 for relief, *Monroe v. Pape,* supra, it is further clear that constitutional interests differ considerably from common law interests. As observed in *Monroe,* 365 U.S. at 196 (Harlan, J. concurring):[40]

> "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right . . . even though the same act may constitute both a state tort and the deprivation of a constitutional right."

[40]Further observing that, apart from the "purest coincidence", a state remedy for an injury possessing constitutional dimensions will likely be "far less than what Congress may have though would be fair reimbursement for deprivation of a constitutional right," *Monroe,* 365 U.S. at 196, n.5 (Harlan, J. concurring), Judge Harlan gave these examples of his point:

> "There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land."

The within facts are akin to the preceding examples. Plaintiff's obstructed letters possess considerably more significance when viewed as thwarted attempts to exercise First Amendment rights than when seen only as personal property wrongfully converted or negligently mishandled. Moreover, the potential gamut of wrongdoing is considerably broader herein than would be the case under the state remedy. Whereas negligence in the latter context refers to carelessness in physical handling of the letters, the within action encompasses careless dealing with the constitutional interests which are recognized to infuse these letters. These interests protect the letters not only from careless physical mishandling, but further from unreasonable censoring criteria careless denial of procedural remedies and the like (see Part III of Respondent's Brief, infra).

The stature of the constitutional interest involved is also a factor in determining stringency of the reasonableness standard to which lower prison officials should be held. Whatever may be said of property rights and other lesser constitutional interests, where fundamental First Amendment freedoms are implicated as herein, considerable weight must be given the prisoner's interest in redress. Considered to possess "transcendant value," *Speiser v. Randall,* 357 U.S. 513, 526 (1958), free expression retains similar policy significance behind prison walls, *Sostre v. McGinnis,* 442 F.2d 178, 199, *en banc,* (2nd Cir. 1971)

> "The values commonly associated with free expression—an open, democratic marketplace of ideas, the self-development of individuals through self-expression, the alleviation of tensions by their release in harsh words rather than hurled objects—these values that we esteem in a free society do not turn to dross in an unfree one."

These values are pivotal to rehabilitation, which "is a moral and intellectual process," *Brown v. Peyton,* 437 F.2d 1228 (4th Cir. 1971). Similarly, the procedural protections intrinsically surrounding free expression—protection against exercise of overly broad censorship discretion, and assurance of opportunity for administrative review of decisions preventing expression—likewise possess recognized value inside prison: "[w]ith some [prisoners], rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent,"[41] *Wolff v. McDonnell,* 418 U.S. 539, 563 (1974). As similarly observed in *Clutchette v. Procunier,* 510 F.2d 613, 615, (9th Cir. 1975), rev'd on other grnds (sub nom *Enomoto v. Clutchette*), 425 U.S. 308 (1976):

> "Any deprivation of the small store of 'privileges' accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a

[41]For authority supporting existence of these procedural protections, see p. 65, infra.

> free setting . . . Deprivation of the more highly valued privileges can have as debilitating an effect on the amenability of a prisoner to rehabilitation as the loss of some good-time credit for a period of isolation from the general prison population."

In light of these weighty policy considerations underlying constitutionally protected prisoner correspondence, negligent interference with such correspondence should be compensable under §1983 whether or not repeated or aggravated.[42]

III.

DEFENDANTS KNEW OR REASONABLY SHOULD HAVE KNOWN THAT THEIR CONDUCT WOULD VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

In *Pierson v. Ray*, supra, 386 U.S. at 555, this Court required for immunity of a police officer who makes an arrest under a statute later held unconstitutional that the officer must have "reasonably believed [the statute] to be valid". Similarly in *Wood v. Strickland*, supra, 420 U.S. at 322, this Court held other executive officials to the requirement that they know the clearly established constitutional rights of persons under their charge, and accordingly deemed such

[42]While virtually no deterrent purpose is served by allowing liability for isolated inadvertance, the considerable compensatory interest to which the foregoing policy considerations attest should sufficiently justify such exposure to §1983 liability, at least in jurisdictions as herein where similar liability exists under state law. Of course, the value of deterring constitutional harm also arises where the negligence is spawned by a correctably careless habitual or customary course of conduct. From evidence thus far elicited herein, it appears that plaintiff's twenty-five obstructed letters may well have fallen victim to such ongoing careless conduct by defendants, whether personal habit or formal practice.

officials subject to monetary liability for conduct which the official "knew or reasonably should have known . . . would violate [these] constitutional rights". Defendants herein contend that they cannot be liable under these standards because in 1971 and 1972 there was "no fundamental right of a prisoner to correspond as part of a first amendment right of free expression or otherwise". (Petitioners' Brief, p. 19). To support this contention, defendants argue that decisions within the Ninth Circuit affirming such a right came later, that a number of other lower federal court decisions holding against such a right existed at the time, and that the later decision by this Court in *Procunier v. Martinez*, 416 U.S. 396 (1974), in any case affirmed only the first amendment rights of nonprisoner correspondents. Defendants further argue that no constitutional right becomes clearly established within the meaning of the foregoing standards until first articulated by this Court. These arguments by defendants fundamentally misconstrue the meaning of the foregoing *Pierson* and *Wood* standards as well as the state of applicable decisional law by 1971-72.

In determining whether a point of constitutional law is sufficiently established within the meaning of the *Pierson* and *Wood* standards, lower federal and state court decisions can be relevant as well as decisions by this Court. In *Cox v. Cook*, 420 U.S. 734 (1975), where an inmate sought damages under §1983 from state prison officials for thrice putting him in solitary confinement between 1968 and 1970 without according him any procedural due process, this Court held that its decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974) did not aid plaintiff's effort to show that defendants failed to meet the *Pierson* standard because *Wolff* was decided after the disciplinary actions in question and in any case possessed no retroactive effect. *Cox* also considered possible relevance under *Pierson* of the federal court decisions in *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) and *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), from the respective district and circuit in which the incidents therein took place.

Landman v. Royster, supra, was similarly ruled out because relevant only "to discipline determinations made in the Eastern District of Virginia after [said] decision," *Cox*, 420 U.S. at 736, and *Landman v. Peyton,* supra, was excluded from consideration because the "uncertain dicta" therein was insufficient to establish "a rule binding on [defendants]," *Cox,* 420 U.S. at 737, n.3. In *Knell v. Bensinger,* 522 F.2d 720 (7th Cir. 1975) the court considered possible monetary liability under §1983 of prison administrators for denying mail privileges and access to counsel to inmates in disciplinary isolation during a two week period in late 1971. Ruling that the foregoing *Wood* standard properly "applies equally to the official conduct of correctional administrators,"[43] *Knell,* 522 F.2d at 724, observed that while decisions of this Court as well as lower federal court decisions had, by late 1971, firmly established the prisoner right to reasonable and effective access to the courts, a showing of "arbitrary and invidious discrimination or caprice" was generally required in 1971 before courts would intervene. *Knell* concluded by pointing to the decision in *Hatfield v. Bailleaux,* 290 F.2d 632 (9th Cir. 1961), upholding the short term stoppage of communication with isolation prisoners, as a decision upon which the *Knell* defendants could reasonably have relied. In *Johnson v. Anderson,* 420 F. Supp. 845 (D. Del. 1976), the court similarly applied the *Wood* standard to a state prison

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[43]In thus ruling that the *Wood* standard applies to prison administrators, *Knell,* 522 F.2d at 725, ventured these policy considerations:

> "[T]he Supreme Court sought to insure that careless disregard or negligent ignorance of clear constitutional rights and duties would not be insulated from liability . . . Accordingly, in the context of prison administration, while the importance of administrative experimentation and discretion in the development of correctional policies and disciplinary procedures has been noted [citations], in exercising their informed discretion, officials must be sensitive and alert to the protections afforded prisoners by the developing judicial scrutiny of prisoner conditions and practices."

superintendant, although with the caveats that the responsibilities of such an official "differ in many ways from the responsibilities of these defendants [in *Wood* and *Scheuer*]", *Johnson,* 420 F. Supp. at 847, and that prison superintendants are not "required to seek legal advice about every aspect of prison life," *Johnson,* 420 F. Supp. at 848. Therein dealing with a §1983 damages action by prisoners put in disciplinary isolation during 1973 without any hearing, the court relied on evidence that the prison superintendant had in fact obtained advice from the attorney general on other aspects of plaintiffs' disciplinary confinement to rule that said defendant was inexcusably ignorant of a decision requiring such hearings issued from that circuit, *Gray v. Creamer,* 465 F.2d 179 (3rd Cir. 1972), nine months previously. Also see: *Picha v. Wielgos,* 410 F. Supp. 1214 (N.D. Ill., E.D. 1976) [constitutional decision by Illinois Supreme Court considered in determining established rights for purposes of *Wood* standard].

It is equally clear that in determining what law was settled at a particular time, potentially relevant constitutional decisions which then existed should be deemed to possess applicability reasonably beyond their own particular facts. Thus, in *Anderson v. Nosser,* 438 F.2d 183 (5th Cir. 1971), the court held to be a jury matter the *Pierson* question of whether the arresting officers therein reasonably knew of the unconstitutionality of the parole ordinance therein involved, which gave the police unlimited discretion to deny permits, where "numerous judicial decisions prior to 1965 had made it clear that statutes which conferred unbridled discretion upon a public official to grant or deny the exercise of expressive activity were invalid," *Anderson,* 438 F.2d at 195. Similarly, in *Slate v. McFetridge,* 484 F.2d 1169 (7th Cir. 1973), the court considered possible §1983 liability of Chicago park district officials for failure promptly to process plaintiffs' request for a large park to hold a political rally during August, 1968. In applying the *Pierson* standard, the court cautioned, *Slate,* 484 F.2d at 1174:

> "[C]ourts should be wary of too broadly construing cases which set down the law of times past, particularly where new cases have widened the scope of doctrine earlier announced . . . Thus, the narrow reading by a public official of a case on constitutional law must be upheld unless patently unreasonable and without arguable support in logic or policy. Nevertheless, we cannot fail to recognize that any case has boundaries of fair application which go beyond situations presenting the facts squarely before the deciding court on the occasion of decision. *Every decision is possessed of a penumbra of analogies.*" (italics supplied).

The court concluded that, while more directly applicable decisions by this Court starting in 1968 "came too late to inform the defendants of the duty they impose," *Slate*, 484 F.2d at 1175, the defendants therein were sufficiently notified by the decision in *Freedman v. Maryland*, 380 U.S. 1 (1965) that due process required prompt resolution of the permit request. The court reasoned as to the *Freedman* decision, which delineated procedural strictures for state censorship of obscene movies, that "[f]ew would argue . . . that the protection of speech and assembly in the context of political parades and demonstrations is an object no less sacred to the First Amendment than the protection of the cinema from the censor," *Slate*, 484 F.2d at 1176. In *Seals v. Nicholl*, 378 F. Supp. 172 (N.D. Ill., E.D. 1973), the court relied on *Slate* in resolving a §1983 damages claim based on a procedural due process violation by the police in sending ineffectual notice to the home of an incarcerated automobile owner regarding a confiscation proceeding for his vehicle. While this court had issued a ruling precisely on point, in *Robinson v. Hanrahan*, 409 U.S. 38 (1972), said decision occured only after the events therein in question. However, the court concluded that "[n]o reasonable interpretation of [*Robinson*] would allow a conclusion that it establishes any new or more severe standard for due process," *Seals*, 378 F. Supp. at 178, and that the defendants still were sufficiently apprised of their notice obligation by the decisions of this

Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, (1950), requiring reasonably effective notice in any proceeding which is to be accorded finality," and *Walker v. Hutchinson* 352 U.S. 112 (1956), applying the *Mullane* notice standard to condemnation proceedings. In similar vein, it was observed in *Picha v. Wielgos*, supra 410 F. Supp. at 1219, as to the *Wood* standard, that

> "it appears that law can be settled without there having been a specific case with identical facts which was decided adversely to the [defendant] officials. There is a limitation to the notion that [defendant] officials can have one 'free' constitutional violation before they are liable for ignoring constitutional rights that arise in each unique factual setting."

Therein inquiring into what settled constitutional standard applied to an allegedly illegal search of a high school student by school officials, the court found applicable the standards enunciated by this court in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), both said rulings involving searches motivated, similarly to the school search therein, by something other than the prospect of obtaining evidence of crime. In *Mukmuk v. Comm'r of Department of Correctional Services*, 529 F.2d 272 (2nd Cir. 1976), the court considered a prisoner's §1983 damages claim for solitary confinement suffered in 1967 as punishment for possessing writings which the defendant prison officials considered inflammatory. Applying the *Pierson* standard, the court upheld the claim insofar as the writings may have been religious in character, because previous decisions by that circuit in *Pierce v. LaValle*, 293 F.2d 233 (2nd Cir. 1961), and *Sostre v. McGinnis*, 334 F.2d 906 (2nd Cir. 1963), and by this Court in *Cooper v. Pate*, 378 U.S. 546 (1964), all of which upheld first amendment rights of prisoners to religious freedom, gave the prison warden "sufficient warning from the courts by 1967 that it was unconstitutional to impose punishment for . . . possession [of religious literature], "*Mukmuk*, 529 F.2d at 275. But *Mukmuk* ruled differently

insofar as the literature was political in character: "punishment for its mere possession may be unconstitutional under present standard. [citing *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971), and *United States ex rel. Larkins v. Oswald*, 510 F.2d 583 (2nd Cir. 1975)] . . . [but] it might be possible for [the warden] to establish that, under the law as it existed in 1967, his actions were in 'good faith reliance on a pre-existing procedure," *Mukmuk*, 529 F.2d at 275.

Applying the foregoing decisions to the within context, it becomes clear that by 1971 state prisoners located within the jurisdiction of the district court below possessed certain settled constitutional rights concerning their correspondence. These rights included due process protection against unreasonable regulation of their correspondence, procedural guarantees arising from the First Amendment, and the due process right of access to the courts. As further argued hereinbelow, the correspondence from plaintiff alleged by the within complaint to have been interfered with by defendants was protected from this interference by one or more of these established rights.

That due process protected prisoner correspondence against unreasonable regulation was clearly established for northern California by decisions which the district court below had rendered before 1971. Eschewing the "array of disparate approaches", *Procunier v. Martinez*, supra, 416 U.S. at 407, to constitutional standards for testing the regulation of communication involving prisoners, this district court instead adopted the due process standard of reasonableness for weighing such prisoner regulation against First Amendment guarantees. Thus in *Hyland v. Procunier*, 311 F. Supp. 749 (N.D. Calif. 1970), the court granted injunctive relief to a parolee from an order by his parole officer barring him from addressing a student ralley concerning conditions at Soledad Prison, the parole officer being fearful that the speech could spark student demonstrations which in turn might ignite disorder amidst the inmate population at said prison. Determining that imposition of this new condition upon

plaintiff's parole constituted a prior restraint directly upon his speech, invalid because the state could not show "a clear and present danger of riot and disorder," *Hyland*, 311 F. Supp. at 750, the court went on to rule:

> "But it is not only the apparent abridgment of the first amendment which concerns the Court. California as well as federal law has imposed the due process rule of reasonableness upon the State's discretion in granting or withholding "privileges" from prisoners, parolees, and probationers . . . [and] defendants herein have made no showing that the condition imposed on plaintiff's parole is in any way related to the valid ends of California's rehabilitation system," *Hyland*, 311 F. Supp. at 750.

In *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Calif. 1970), aff'd (sub nom *Younger v. Gilmore*) 404 U.S. 15 (1971), a three judge court echoed *Hyland* in testing the sufficiency of California prison law libraries in terms of a due process reasonableness standard applicable in varying degree to all constitutional rights for prisoners. The court summarized this viewpoint in stating that "prison officials are not now such masters of their own domain as to be free of the restraints of constitutional reasonability[44] [citing *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944), cert. den. 325 U.S. 887 (1945),

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[44] In here citing *Coffin v. Reichard*, supra, and *Jackson v. Godwin*, supra, the *Gilmore* decision confirms beyond doubt that the district court below intended the due process reasonableness test to apply to restrictions which curtail any prisoner right, including the right of free expression, to a degree less than enjoyed by free citizens. *Coffin* originated this "retained rights" approach with its oft-cited pronouncement that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law." *Coffin*, 143 F.2d at 445. In *Jackson*, involving the discriminatory denial to a black prisoner of black-oriented newspapers and magazines, the court declared, *Jackson*, 400 F.2d at 533, that "constitutional safeguards are intended to protect the rights of all citizens, including prisoners . . . particularly in the area of racial discrimination and deprivation of First Amendment freedoms."

and *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968)]", *Gilmore*, 319 F. Supp. at 108. The court further explained, *Gilmore*, 319 F. Supp. at 108-09, 109 n.6:

> "The courts have used various linguistic formulae to describe the limits to prison rulemaking authority . . . In most cases, however, the basic test remains the same: the asserted interest of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule . . . prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the character of the right taken from the prisoner."

Since First Amendment freedoms, including free speech, enjoy, "preferred" status, *Saia v. New York*, 334 U.S. 558, 561 (1947), *Jackson v. Godwin*, supra, the district court was unmistakably saying in *Gilmore* that prison regulations curtailing prisoner rights in the First Amendment area must meet an exacting test of reasonableness in order to pass muster.[45]

Between the *Gilmore* decision and the time period involved herein, the district court below rendered decisions further applying due process reasonableness to prison regulations restricting First Amendment rights. In *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Calif. 1970) the court vindicated in several respects the religious freedom of Muslim prisoners, one respect being to allow prisoner subscriptions to the Muslim newspaper upon determining that "past availability of [this]

[45]That the due process standard established by the district court below before 1971-72 demanded *stringent* reasonableness is not necessarily indispensible to plaintiff's contention that defendants violated his free expression rights while regulating his mail during 1971-72. Evidence aired thus far suggests that it could well be proven at trial that defendants obstructed plaintiff's mail for subjective and erratic reasons possessing no connection to any legitimate state interest, and hence deficient under *any* reasonableness standard (see pp. 67-68, infra).

subscription . . . has not resulted in disruption of prison discipline," *Northern*, 315 F. Supp. at 688. In *Payne v. Whitmore*, 325 F. Supp. 1191, 1193 (N.D. Calif. 1971), decided on April 7, 1971, the court confirmed First Amendment rights of county main jail and medium security inmates to receive newspapers and magazines:

> "Whether couched in terms of the rights explicitly listed in the first ten amendments, or in terms of equal protection, or in terms of constitutional reasonability, these cases are united on one point: prison rules must bear a reasonable relationship to valid prison goals, and rules which infringe upon particularly important rights will require a proportionately stronger justification. [citing *Gilmore v. Lynch*, supra]"

Finally in *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Calif. 1972), decided on May 12, 1972, in midst of the period herein involved, the court considered constitutional challenges by pretrial detainees to various county jail conditions, including prisoner mail restrictions. Acknowledging that mail restrictions for convicted prisoners can be justifiably greater than for detainees, and may include the reading of incoming mail and some limitation on persons to whom outgoing mail can be sent, the court confirmed the exacting standard of reasonableness to which *all* prisoner correspondence is entitled, *Brenneman*, 343 F. Supp. at 142.

> "[B]etween the extremes of wholesale censorship and unbridled enjoyment of First Amendment rights, there are various alternative methods of regulating prisoner correspondence. The defendants must choose the least restrictive of those alternatives. See generally *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971)."

The foregoing decisions by the district court below were accompanied prior to 1971-72 by similar decisions from the

circuit court below,[46] the California state courts,[47] and lower federal courts in most other circuits.[48]

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[46]In *Smith v. Schneckloth*, 414 F.2d 680 (9th Cir. 1969), the circuit court below acknowledged that equal protection and due process guarantees follow inmates into prison to require of correctional authorities a standard of reasonable action. In *Seattle-Tacoma Newspaper Guild, Local #82 v. Parker*, 480 F.2d 1062, 1065 (9th Cir. 1973), although decided after the pertinent time period, this circuit stated it to be "*axiomatic* that prison inmates . . . [do] not shed [their] first amendment rights at the prison portal," (italics supplied) relying for this proposition on its previous decision in *Smith* and on two supporting decisions rendered by other circuits during 1971–*Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971), and *Sostre v. McGinnis*, 442 F.2d 172 2nd Cir. 1971.

[47]In *Davis v. Superior Court*, 175 Cal. App. 2d 8, 20, 345 P.2d 513 (1959), the court acknowledged that prisoners possess, in necessarily curtailed form, the "freedoms of speech and communication", and on the basis of these residual rights placed a limit of reasonableness on exercises of the otherwise unqualified statutory power of prison wardens to censor and forbid prisoner communication. The state supreme court, in *In re Ferguson*, 55 Cal. 2d 663, 671, 12 Cal. Rptr. 753, 361 P.2d 417 (1961), declared itself "reluctant to apply federal constitutional doctrines to state prison rules reasonably necessary to the orderly conduct of the state institution," unless extreme mistreatment could be shown. However, in *In re Harrell*, 2 Cal. 3d 675, 87 Cal. Rptr. 504, 470 P.2d 640 (1970), the court, acknowledging generally that "constitutional rights of persons committed to prison must be accorded the same zealous protection that all constitutional rights enjoy," *Harrell* at 693, and in particular that "*Johnson v. Avery* heralds the advent of new principles governing the question of prisoner access to legal materials," *Harrell* at 695. The state supreme court formulated a stringent reasonableness test involving scrutiny of less restrictive alternatives in relation to such issues of prisoner access, *Harrell* at 686.

[48]The lower federal courts in other circuits had, by 1971, already dramatically eroded the "hands off" doctrine from the nearly complete hegemony which this judicial reluctance to consider prisoner rights possessed until the mid-1960's. In 1971, the "hands off" doctrine was entirely eclipsed in four circuits within which decisions then existed applying constitutional tests to protect prisoner rights of free expression. In the FIRST CIRCUIT, constitutional tests were

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The clear import of the foregoing line of decisions by the district court below that prisoner correspondence possessed

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formulated in *Palmigiano v. Travisono*, 317 F. Supp. 776 (D. Rh. Is. 1970) [upheld pretrial detainee correspondence], and *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971) [upheld inmate letters to press]. In the SECOND CIRCUIT, a "hands off" decision in *Thompson v. Fay*, 197 F. Supp. 855 (S.D. N.Y. 1961) [denied inmate contact with prison investigators] was supplanted by approval of constitutional tests in *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970) [upheld prison reform magazine] *Corothers v. Follette* 314 F. Supp. 1014 (S.D.N.Y. 1970) [upheld inmates correspondence] and, *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971), cert. den. 404 U.S. 1049 (1972) [dicta on protecting content of inmate expression]. *Wilkinson v. Skinner*, 462 F.2d 670 (1972) [upheld all inmate mail content] predictably followed from *Sostre*. In the THIRD CIRCUIT, constitutional tests were approved in *United States ex rel. Gabor v. Myers*, 237 F. Supp. 852 (E.D. Pa. 1965) [upheld inmate personal mail], *Long v. Parker*, 390 F.2d 816 (3rd Cir. 1968) [upheld religious literature], and *Owens v. Brierly*, 452 F.2d 640 (3rd Cir. 1971) [upheld black oriented magazines]. In the FOURTH CIRCUIT, the "hands off" decision in *McCloskey v. Maryland*, 337 F.2d 72 (4th Cir. 1964) [denied nonlegal correspondence], was supplemented by approval of constitutional tests in *McDonough v. Director of Patuxent*, 429 F.2d 1189 (4th Cir. 1970) [interests balanced in denying correspondence], *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971) [upheld religious literature], and *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) [upheld official mail]. In the FIFTH CIRCUIT a comparatively early decision protecting prisoner expression, *Jackson v. Godwin*, 400 F.2d 529 (5 Cir. 1968) [black-oriented newspapers and magazines], often cited in other circuits in support of prisoner expression rights, egregiously did not forestall further "hands off" decisions in that circuit. Cf. *Brown v. Wainwright*, 419 F.2d 1308 (5th Cir. 1969) [denied general inmate mail], and *Theriault v. Blackwell*,, 437 F.2d 76 (5th Cir. 1970), cert. den. 402 U.S. 953 (1971) [denied letter to newspaper]. Each of the remaining circuits also possessed, by 1971, decisions embracing constitutional doctrine from which decisions actually protecting prisoner expression could reasonably be foreseen to follow. Within these circuits, such doctrinal decisions generally marked the substantial muting or termination of the "hands off" doctrine, and were invariably followed within several years by decisions from the same circuits actually upholding prisoner

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constitutional protection was further emphasized by existing decisions of this Court. In *Cooper v. Pate*, 378 U.S. 546 (1964), the First Amendment was affirmed to extend within prison walls insofar as religious freedom is concerned. Also see: *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curium*, 390 U.S. 333 (1967) [prisoners do not lose all constitutional rights, and are protected by due process and equal protection]. That *Cooper* suggested if not portended the application of First Amendment rights to protect prisoner correspondence is driven home by established constitutional

(footnote continued from preceding page)

expression. Thus in the SIXTH CIRCUIT, the decisions in *Jones v. Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971) and 330 F. Supp. 707 (N.D. Ohio) [inmate correspondence denied through constitutional balancing] preceded *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Kan. 1973) [upheld inmate expression]. In the SEVENTH CIRCUIT, the "hands off" decision in *Goodchild v. Schmidt*, 279 F. Supp. 149 (D. Wis. 1968) [denied medical letter], gave way to a religious expression test in *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967) [upheld religious literature] which served as a harbinger for *Adams v. Carlson*, 352 F. Supp. 882 (E.D. Illin. 1973) [upheld all inmate expression], and *Morales v. Schmidt*, 489 F.2d 1335 (7th Cir. 1973) [upheld all inmate expression]. In the EIGHTH CIRCUIT, the "hands off" decision in *Lee v. Tahash*, 351 F.2d 970 (8th Cir. 1965) [denied nonlegal mail], was departed from in *Peek v. Ciccone*, 288 F Supp. 329 (W.D. No. 1968) [upheld religious letter], which led directly to *Tyler v. Ciccone*, 299 F. Supp. 684 (W.D. Mo. 1969) [upheld inmate expression], and *Remmer v. Brewer*, 475 F.2d 52 (8th Cir. 1973) [protecting all inmate expression]. In the TENTH CIRCUIT, the "hands off" decision in *Pope v. Daggett*, 350 F.2d 297 (10th Cir. 1965) *vacated as moot*, 384 U.S. 33 (1966) [denied letter to probation officer], gave way to *LeVier v. Woodson*, 443 F.2d 361 (10th Cir. 1971) [upheld legal and official mail], which was supplanted in turn by *Battle v. Anderson*, 376 F. Supp. 402 (C.D. Okla. 1974) [protecting all expression]. In the DISTRICT OF COLUMBIA CIRCUIT, *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) [upheld religious freedom] pronounced broad First Amendment doctrine that led directly to affirmation of prisoner free speech rights in *Washington Post v. Kleindienst*, 357 F. Supp. 770 (D.D.C. 1972), *modified*, 494 F.2d 994 (D.C. Cir. 1974), *rev'd on other grnds* (sub nom *Saxbe v. Washington Post Co.*) 417 U.S. 843 (1974).

interpretations of free expression and religious freedom as closely interrelated guarantees, *Saia v. New York*, supra [both guarantees stand together as preferred freedoms], *Cantwell v. Connecticut*, 310 U.S. 296 (1939) [both guarantees invoked by facts therein], and of expression through the medium of mail as falling squarely within the ambit of First Amendment protection, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), *Blount v. Rizzi*, 400 U.S. 410 (1971).

Existing decisions by this Court also made clear that prisoners were entitled in 1971 to some measure of procedural protection for their mail against unwarranted infringement, at least in jurisdictions where as herein prisoner mail was clearly recognized to be infused by fundamental constitutional guarantees. As to rule-making impositions upon speech, it was long established that the First Amendment furnished procedural protection against "licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to [legitimate purposes]", *Kunz v. New York*, 340 U.S. 290, 294 (1950). As to adjudicatory impositions upon speech, it was established that the finely drawn "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished . . . calls for . . . sensitive tools," *Speiser v. Randall*, 357 U.S. 513, 526 (1958). It was in application of the latter precept that this Court, in *Freedman v. Maryland*, supra, prescribed prompt judicial review of administrative decisions to censor movies deemed obscene. This procedural safeguard for review of administrative censoring decisions was applied, in *Blount v. Rizzi*, supra, to facts closely analogous to the within context, the Court there requiring prompt judicial review of obscene mail censorship by postal officials

Another form of constitutional protection, indisputably established before 1971, which reached a sizeable share of prisoner mail consisted in the right of access to the courts. Assured by due process, this right was first recognized in *Ex Parte Hull*, 312 U.S. 546 (1940) and well established in

decisions of the federal and state courts in California, *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961), *Dewitt v. Pail*, 366 F.2d 682 (9th Cir. 1966), *Gilmore v. Lynch*, supra, *In re Allison*, 66 Cal.2d 682, 67 Cal. Rptr. 593, 425 P.2d 193 (1967), *In re Harrell*, supra. Formerly protected by only limited judicial scrutiny which was deemed satisfied so long as a reasonable degree of court access was allowed, even if "access could have been further facilitated without impairing effective prison administration," *Hatfield*, supra, 290 F.2d at 640, the prisoner right of access was clearly recognized by 1970 as "a constitutional imperative which has been held to prevail against a variety of state interests," *Gilmore*, 319 F. Supp. at 109, and to possess the enhanced protection of a stringent reasonableness test in which the balancing of interests includes inquiry into less restrictive state alternatives, *In re Harrell*, supra.

This right of access clearly encompassed "all the means a defendant or petitioner might required to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him," *Gilmore*, 319 F. Supp. at 109, and accordingly had been applied to permit a prisoner to contact his attorney by telegram rather than ordinary letter, *Allison*, and to send letters for such purposes as seeking to retain legal organizations, *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970) [ACLU], *Coleman v. Peyton*, 340 F.2d 603 (4th Cir. 1965) [NAACP], securing needed expert witnesses, *McDonough v. Director of Patuxent*, supra [psychiatrist], *Glenn v. Wilkinson*, 309 F. Supp. 411 (W.D. Miss. 1970) [medical expert], and raising funds to defray needed legal expenses, *McDonough v. Director of Patuxent*, supra, [magazine sponsored fund-raising sought].

The foregoing review of decisional law prior to 1971 removes any possibility that defendants herein could reasonably have believed valid any instances of interference with plaintiff's outgoing mail which are ultimately found to

conflict with the constitutional standards established by these decisions.[49]

[49]The preliminary evidence presented for summary judgment suggests that the interference with plaintiff's mail may well have conflicted with the foregoing constitutional standards in these respects:

(1) *First Amendment and due process protection:* the state regulations appear to delegate nearly unlimited discretion to prison wardens to make mail decisions in any manner they wish (see footnote 8, supra). The criteria set forth in D2402(8) of these regulations, particularly the prohibitions therein of mail deemed "defamatory" or "otherwise inappropriate" appear likely to have further fostered loosely made mail decisions. Indeed, the Soledad associate warden admitted to plaintiff that officials at his prison took a loose, subjective approach in confiscating prisoner mail (R 77-78), and the rejection of plaintiff's news media letters because not legal, business, or personal (see footnote 9, supra) certainly seems to confirm the free play of subjective whim in mail decisions at Soledad. Also see: *Procunier v. Martinez, supra,* 416 U.S. at 415-416. To the extent it is ultimately proved herein that plaintiff's obstructed correspondence fell victim to such ill-considered decision-making, the due process requirement that mail obstruction be reasonably justified by legitimate state objectives would doubtless have been contravened, as would the procedural protection of plaintiff's First Amendment interests against undue delegation of regulatory power.

The further First Amendment and due process assurance of procedural recourse from mail refusals believed constitutionally unjustified certainly called by 1971 for at least limited opportunity to seek administrative review of such determinations. Cut to the most minimal, such opportunity for review includes return of the refused mail to the inmate or other notification to him of the refusal, together with at least the ad hoc availability of some administrative superior to review mail refusals at inmate request. It presently stands undisputed herein that, apart from return of his news media letters and the communicated refusal to register his letter to the Prison Law Project, plaintiff was never even notified in any manner of decisions to interfere with his mail.

(2) *Right of access protection:* it may well be found that interference with certain of plaintiff's mail effectively barred him from obtaining judicial relief. As to his federal habeas corpus effort, it could ultimately be found that plaintiff was denied judicial relief therein because repeated mail interference barred him at every turn from obtaining the help needed to articulate his claims with full effect (see

(continued)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be confirmed.

Respectfully submitted,

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(footnote continued from preceding page)
pp. 2-5, supra). As to the within civil rights action, it may well be found that obstruction of plaintiff's letters to law projects during early 1972 seeking their representation in the within matter effectively denied to plaintiff the injunctive relief from further mail interference that comprised his pivotal objective in undertaking this action.